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Exploring the Scope of Article 19(1) TEU

A New Horizon for the Enforcement of the Rule of Law in EU Member States?

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Abstract

The dismantling of the rule of law in a number of Member States of the EU poses a grave threat to the Union's foundational ideals as well as its fundamental legal structures. This thesis examines the Court of Justice's recent response to the ongoing rule of law crisis in the EU. In a new line of case law, the Court has acted to protect the judicial independence of the national courts across the Union and has relied on an a hitherto unused and largely overlooked Treaty provision – the second subparagraph of Article 19(1) TEU. The thesis explores two principal issues relating to this new case law development. Firstly, it assesses whether the Court has in fact expanded the scope of EU law through its recent interpretation of Article 19(1) as a rule of law provision. Secondly, it examines the broader impact of this development on the overarching relationship between the Court itself and the national courts.

The thesis finds that the Court of Justice's recent use of the second subparagraph of Article 19(1) TEU constitutes a significant development of EU law, both in relation to the provision in itself and the general scope of Union law. Through an innovative interpretation of Article 19(1), which in part relies upon a flexible use of Article 47 of the Charter of Fundamental Rights, the Court has laid down a general obligation on Member States to guarantee the judicial independence of their courts. The thesis argues that the Court has thereby managed to establish jurisdiction over the organisation of justice in Member States, which entails a substantial limitation to the procedural autonomy of those states. Furthermore, the thesis contends that the new interpretation of Article 19(1) TEU has reinforced the national courts' role as 'European courts', while also solidifying the Court of Justice's own position as the central court in the Union's judicial system. The thesis therefore concludes that the recent development has strengthened the cooperative relationship between the Court and the national courts. In light of all this, it is predicted that the recent interpretation of Article 19(1) TEU could pave the way for a stronger judicial enforcement of the rule of law in EU Member States.

Abbreviations

AG	Advocate General
Charter	Charter of Fundamental Rights of the European Union
Commission	European Commission
Council	Council of the European Union
Court of Justice	Court of Justice of the European Union
EC Treaty	Treaty establishing the European Community
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEC Treaty	Treaty establishing the European Economic Community
EU	European Union
TEU	Treaty on European Union
TFEU	Treaty on the Function of the European Union
Venice Commission	European Commission for Democracy through Law

1 Introduction

1.1 Background

In recent years, the rule of law has been increasingly undermined in a number of Member States of the European Union.[1] This process, which appears to be ongoing, constitutes a particularly grave challenge for the EU since the rule of law is one of the foundational values of the organisation, enshrined in Article 2 TEU. In addition, respect for the rule of law is a cornerstone of the mutual trust intended to characterise the relationship between Member States, a notion which is in turn a precondition for the functioning of the EU's single market and system of judicial cooperation.[2] The question on how to address rule of law violations within the Union is therefore highly relevant, as the recent backsliding threatens to damage the very bedrock of the EU.

The Union has increased its political efforts to address rule of law deficiencies among Member States, but tangible results have so far been limited. In 2017, the Commission initiated the first ever Article 7 TEU procedure against a Member State, the so-called 'nuclear option', regarding the rule of law in Poland.[3] The following year a second procedure was launched by the European Parliament against Hungary.[4] Although these procedures could potentially result in the suspension of certain rights for the Member States concerned, including voting rights, such action requires a unanimous decision in the Council. So far, this has proved politically impossible to achieve in practice. Similarly, recent efforts to make the receiving of EU funds conditional upon respect for the rule of law have also been challenged and stalled by political manoeuvring.[5]

In the absence of effective political measures, the attention has increasingly turned towards the Court of Justice. Through a growing number of infringement proceedings and

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[1] See Bureau of the Consultative Council of European Judges, *Report on judicial independence and impartiality in the Council of Europe Member States (2019 edition)*, CCJE-BU(2020)3, 30 March 2020, p. 66.

[2] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions – 2020 Rule of Law Report*, COM(2020) 580 final, 30 September 2020, p. 2.

[3] European Commission, *Reasoned Proposal in accordance with Article 7(1) of the Treaty on the European Union regarding the Rule of Law in Poland*, COM(2017) 835 final, 20 December 2017.

[4] European Parliament, *Texts adopted – The situation in Hungary*, document P8_TAPROV(2018)03-40, 12 September 2018.

[5] A. Bodnar & P. Filipek (2020), 'Time is of the Essence', *Verfassungsblog* (30 November 2020).

preliminary rulings, the Court has gradually adopted a leading role in safeguarding the rule of law in the EU. In particular, the Court has acted to protect the judicial independence of the national courts across the Union, repeatedly disciplining Member States who have attempted to undermine it.[6] As the legal basis, the Court has principally relied on one central provision – the second subparagraph of Article 19(1) TEU:

> 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'[7]

Previously, this provision has received scarce attention and has been regarded merely as an echo of the principle of sincere cooperation established in Article 4(3) TEU, adding nothing new in itself.[8] In its recent case law, however, the Court has interpreted the concept of 'effective judicial protection' in the provision, and applied it together with Article 47 of the Charter, in order to ensure the judicial independence of national courts.[9] The second subparagraph of Article 19(1) TEU has thereby emerged as a substantive rule of law provision, enabling the Court to intervene in errant Member States accused of undercutting the rule of law. Thus, the recent development indicates a novel and innovative use of Article 19(1), which in turn raises a number of questions. Has the Court in fact expanded the scope of EU law through its interpretation of the provision? If so, how does this impact the overarching relationship between the Court of Justice and the courts of the Member States? These questions are the starting point of the present thesis, which will aim to shed light on Article 19(1) TEU and the rule of law crisis in the EU.

1.2 Thesis Purpose and Research Questions

The main purpose of this thesis is twofold. Firstly, the study seeks to examine the second subparagraph of Article 19(1) TEU and its recent use as a rule of law provision in the case law, in order to assess whether the scope of EU law has expanded. Secondly, it strives to analyse the broader impact of this development on the relationship between the Court

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[6] K. Lenaerts (2020), 'New Horizons for the Rule of Law Within the EU' in: *German Law Journal*, Vol. 21(1), pp. 33-34.
[7] Second subparagraph of Article 19(1) TEU.
[8] See e.g. A. Arnull (2013), 'Article 19 [The Court of Justice of the European Union]' in: *The Treaty on the European Union (TEU): A commentary*, H.J. Blanke & S. Mangiameli (eds.), p. 767.
[9] Cf. M. Bonelli & M. Claes (2018), 'Judicial Serendipity: How Portuguese Judges came to the rescue of the Polish judiciary' in: *European Constitutional Law Review,* vol. 14(3), pp. 622-625.

and the courts of the Member States. To fulfil these purposes, two primary research questions will be answered:

- In light of the Court of Justice's recent case law regarding the second subparagraph of Article 19(1) TEU and the rule of law, has the Court expanded the scope of EU law?
- How does this development impact the relationship between the Court of Justice and the courts of the Member States?

These questions contain a number of different components, which may require further clarification. Therefore, in order to fully answer the primary questions, four secondary research questions will be addressed throughout the thesis:

- How is the rule of law generally defined in the EU legal order?
- What is the origin of the second subparagraph of Article 19(1) TEU, as well as the meaning of the related principle of effective judicial protection and Article 47 of the Charter?
- What key legal mechanisms and principles characterise the relationship between the Court of Justice and the courts of the Member States?
- What conclusions can be drawn from *Portuguese Judges*[10], *Commission v Poland (Independence of the Supreme Court)*[11] and *A.K. and Others*[12] regarding the scope and substance of the second subparagraph of Article 19(1) TEU?

1.3 Delimitations

Since the thesis relates to the broad subject of the rule of law in the EU, a number of limitations are necessary. To begin with, the thesis will not comprehensively analyse and define the precise components of the rule of law as such, which is a wide concept without a universally accepted definition. Instead, as indicated by the research questions, the study will focus on delineating the *main* components of the rule of law in the EU, thus providing a general definition of the concept. This will be sufficient for understanding the

[10] Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] EU:C:2018:117.
[11] Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* [2019] EU:C:2019:531
[12] Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others* [2019] EU:C:2019:982.

overarching theme of the thesis, as well as how the second subparagraph of Article 19(1) TEU and the recent case law from the Court of Justice relates to the rule of law.

Furthermore, the thesis will focus solely on the Court of Justice's use of Article 19(1) TEU in relation to the rule of law in Member States. The application of the provision in other contexts, for example vis-à-vis the Union's own institutions, will therefore not be considered. In addition, the scope of the thesis does not leave room to analyse all recent case law on Article 19(1). Thus, a selection of cases for in-depth analysis has been made, which will be explained below. In this respect, it ought to be emphasised that since the thesis is specifically concerned with the use of Article 19(1), the case law analysis will focus primarily on aspects that are relevant to that end. This entails that certain parts of the judgments without bearing on the provision will not be addressed, unless they are important for understanding the Court's reasoning.

The thesis is also limited with regard to the ECHR and the case law of the ECtHR, which will not form part of the study. Nonetheless, it is important to underscore that Article 6 and 13 ECHR also give expression to the concept of effective judicial protection and served as specific inspiration to Article 47 of the Charter.[13] Pursuant to Article 52(3) of the Charter, rights contained therein must be interpreted in light of the corresponding rights in the ECHR and offer *at least* the same level of protection. In principle, this entails that the case law of the ECtHR on Article 6 and 13 ECHR is relevant with regard to Article 47 of the Charter. However, it is widely established that Article 47 offers a higher level of protection than the ECHR in this regard.[14] For the purpose of the thesis, it will therefore be sufficient to focus solely Article 47 and the case law of the Court of Justice.

1.4 Methodology and Material

To achieve the objectives outlined above, the legal dogmatic method will be applied. The aim of this method can in essence be described as seeking the answer to a legal problem by determining what the law is.[15] This is achieved through a study of the acknowledged

[13] See Explanations Relating to the Charter of Fundamental Rights, *Explanation on Article 47 – Right to an effective remedy and to a fair trial*, doc. 2007/C 303/02.
[14] Ibid.
[15] J. Kleineman (2018), 'Rättsdogmatisk metod' in: *Juridisk Metodlära*, M. Nääv & M. Zamboni (eds.), p. 21.

sources of law, which are used to identify, describe and systemise the applicable legal rules to the issue in question.[16] The method appears appropriate for the present thesis, as the research questions revolve around an examination of a specific legal provision and its development in the legal sources of the EU.

Because the thesis falls within the sphere of EU law, the legal dogmatic method will be applied in conjunction with the EU legal method. This method has been described as an approach on how to deal with EU legal sources, taking into account the specific characteristics and hierarchy of Union law.[17] The hierarchy is grounded upon the principal division between primary and secondary EU law. The former includes the two main constitutive Treaties, TEU and TFEU, the Charter and certain other foundational legislation, e.g. protocols annexed to the Treaties. Moreover, numerous general principles of Union law are also considered to have the status of EU primary law.[18] Secondary law, on the other hand, is legislation derived from primary law, commonly in the form of regulations, directives and decisions. In hierarchal terms, this body of law is inferior to primary law and has to be designed and interpreted in compliance with it.[19]

In addition, the jurisprudence of the Court of Justice is an authoritative legal source within EU law. Pursuant to the first paragraph of Article 19(1) TEU, the Court is the ultimate arbiter on the interpretation and application of all Union law, both primary and secondary, and it therefore has a wide mandate to rule on issues connected to various aspects of the EU. While the Court itself employs a number of different interpretative methods, it is generally noted for its extensive use of teleological reasoning.[20] This can be explained by the fact that many Treaty provisions are purpose-driven and vague, thus leaving room for and necessitating the Court to interpret the law in line with its objectives.[21]

The present thesis will focus on EU primary law, as the main provisions and concept studied are contained therein. Furthermore, judgments from the Court of Justice will form

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[16] Ibid.
[17] J. Reichel (2018), 'EU-rättslig metod' in: *Juridisk Metodlära*, M. Nääv & M. Zamboni (eds.), pp. 109–110.
[18] J. Hettne & I. Otken Eriksson (2018), *EU-rättslig metod*, p. 44.
[19] Ibid. pp. 41–43.
[20] K. Lenaerts & J.A. Gutiérrez-Fons (2013), 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' in: *EUI Working Paper AEL 2013/9*, pp. 24-26.
[21] Hettne & Otken Eriksson (2018), *supra* note 18, p. 168.

an especially important part of the thesis as well as a primary source of information. As noted, however, the scope of the thesis does not allow a full examination of all relevant case law. A selection has therefore been made and three recent cases will form the main source for in-depth analysis concerning the second subparagraph of Article 19(1) TEU. These cases have been selected based on their recent impact and legal relevance with regard to Article 19(1) TEU and Article 47 of the Charter. Their legal value in this regard is accentuated by the fact that all cases have been frequently debated in the legal literature and have been referred to by the Court itself in subsequent judgments. In addition, all three cases stem from the Court's Grand Chamber, which generally indicates a high level of significance and legal value.[22]

Along with the Court of Justice's judgments, the case law analysis will also include the opinions of the Advocate Generals. These opinions are not legally binding per se but often contain a more comprehensive, detailed and critical examination of the legal arguments relevant to the case at issue. In general, this is due to the fact that the Advocate Generals enjoy a wider degree of discretion in their reasoning compared to the Court, which allows them to include, *inter alia*, personal reflections and comparisons between different solutions.[23] The opinions are thereby an invaluable source for broadening the analysis of a particular case, and they can also provide a basis for assessing the Court's conclusions.

Furthermore, *travaux préparatoires* will be used as a source to examine, in particular, the original purpose behind the second subparagraph of Article 19(1) TEU. The legal value of preparatory documents was long considered limited within EU law, the main method of interpretation being based primarily on the wording and context of a provision.[24] However, the Court of Justice has increasingly recognised the importance of preparatory work as relevant legal sources for interpretation when the wording of a provision is unsatisfactory in itself. For example, in *Inuit Tapiriit* the Court used *travaux préparatoires* to establish the origins and purpose behind the concept of 'regulatory acts' in Article 263 TFEU, which had a crucial bearing on the case.[25] This interpretative approach has notably been reaffirmed in subsequent case law.[26] Nevertheless, the use of

[22] P. Craig & G. de Búrca (2020), *EU law: Text, Cases and Materials*, p. 88.
[23] Ibid. pp. 91-92.
[24] Lenaerts & Gutiérrez-Fons (2013), *supra* note 20, p. 19.
[25] Case C-583/11 P *Inuit Tapiriit Kanatami* [2013] EU:C:2013:625, para. 59.
[26] See Case C-621/18 *Wightman and Others* [2018] EU:C:2018:99, para. 47 and the case law cited.

preparatory work within EU law must also be done with a degree of caution. One aspect to consider is the fact that many of the documents were never drafted with the intention of being used as legal sources and therefore pay little attention to details and clarity.[27]

Besides case law and preparatory work, the examination will include official documents from EU institutions. As legal sources, these documents are considered soft law and have a subsidiary role in the hierarchy of norms.[28] In practice, however, they often have a normative effect and can contribute by articulating the state of play and providing working definitions to legal concepts, e.g. the rule of law. While it is important to point out that they are not legally binding, the documents will thus be used in the thesis to complement and fill out the other legal sources.

Similarly, legal literature will be included to supplement the abovementioned sources. In the EU hierarchy of norms, such literature is also considered a source of lower status and, by way of illustration, is never directly referred to by the Court of Justice. Nevertheless, the body of scholarly work analysing EU law is extensive and may contribute with angles, criticism and insights otherwise not available through the traditional sources. In this way, legal literature and discourse may broaden and nuance the understanding of EU law.

1.5 Structure

The structure of the thesis is closely connected with the practical manner in which the research questions will be addressed and analysed. Thus, the second chapter will assess how the rule of law is generally defined in the EU. Thereafter, the third chapter will examine the origins of the second subparagraph of Article 19(1) TEU, as well as the related principle of effective judicial protection and Article 47 of the Charter. Chapter four will then outline the central principles and mechanisms which characterise the relationship between the Court of Justice and the national courts. In the fifth chapter, the three selected cases from the Court will be presented and thoroughly analysed. The final chapter of the thesis will then contain the general analysis in which the two primary research questions are answered, drawing upon the findings of the previous chapters.

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[27] Lenaerts & Gutiérrez-Fons (2013), *supra* note 20, pp. 22-23.
[28] Reichel (2018), *supra* note 17, pp. 127-128.

2 The Rule of Law in the EU Legal Order

2.1 Introduction

In this chapter, the development and main components of the rule of law in the EU will be outlined and analysed, in order to provide a general definition of the concept. As mentioned, this is essential for understanding both the overarching theme of the thesis and subsequently how Article 19(1) TEU relates to the rule of law. The chapter will focus on how the rule of law has evolved into a founding value of the EU, its enshrinement in Article 2 TEU and on the existing definitions of its primary components. This is concluded with an analysis of the current status and main elements of the EU rule of law.

2.2 The Road Towards a Union Founded on the Rule of Law

The rule of law has been described as one of the most recognised and widely supported political ideals in history.[29] However, no universal definition of the concept exists, and it has been argued that 'the high degree of consensus on the virtues of the rule of law is possible only because of dissensus as to its meaning.'[30] In a European context, there is similarly no common definition of the rule of law in the national constitutions. Nonetheless, the core of the modern understanding of the concept across Europe has largely been formed by the same main legal traditions and ideas.[31] Influences from primarily the English *Rule of Law*, the French *État de droit* and the German *Rechtstaat* have established the rule of law as a part of the common constitutional tradition across Europe, despite certain national variations in content and terminology.[32]

On an EU level, the rule of law was first introduced as part of the Union's legal order in 1986 by the Court of Justice, in its landmark decision in *Les Verts v Parliament*.[33] The case concerned whether a decision by the European Parliament could be challenged in an

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[29] B. Tamanaha (2004), *On the Rule of Law: History, Politics, Theory*, p. 3. See also J. Waldron (2008), 'The Concept and the Rule of Law' in: *Georgia Law Review*, vol. 43, pp. 1-5.
[30] S. Chesterman (2008), 'An International Rule of Law?' in: *American Journal of Comparative Law*, vol. 56:2, p. 332.
[31] L. Pech (2009), 'The Rule of Law as a Constitutional Principle of the European Union' in: *Jean Monnet Working Paper*, 4/2009, p. 24
[32] Ibid. 44.
[33] Case 294/83 *Les Verts v Parliament* [1986] EU:C:1986:166.

annulment action brought by a third party, which was not expressly allowed under Union law at the time. The Court ruled to permit such actions, and notably held:

> 'It must first be emphasised in this regard that the European Economic Community is a *Community based on the rule of law*, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.'[34]

This was the first time that the rule of law was clearly stated as part of the foundation of the Union.[35] It can thus be noted that the rule of law was not originally an explicit part of EU primary law, and that the Court was the first institution to lay it down within the legal framework. Formal enshrinement of the rule of law in primary law first came via the 1992 Maastricht Treaty, in which multiple references to the concept were included in the founding Treaties. For instance, the Preamble of the TEU stated that the Member States confirmed their 'attachment' to the rule of law, amongst a number of principles. The next significant development occurred in 1997, when the Treaty of Amsterdam further solidified the EU rule of law by including it in Article 6(1) TEU, which then provided:

> 'The Union is founded on the *principles* of liberty, democracy, respect for human rights and fundamental freedoms, and *the rule of law*, principles which are common to the Member States.'[36]

In addition, the Treaty of Amsterdam created two other significant provisions in regard to the rule of law. Firstly, the original version of Article 7 TEU was formally introduced, enabling action against serious and persistent breaches of the principles in Article 6(1), e.g. the rule of law. Secondly, compliance with the rule of law and other founding principles became an explicit precondition for becoming a Member of the EU, pursuant to Article 49 TEU. This had already been made clear by the European Council in 1993, in the so-called Copenhagen criteria[37], but it had not previously been codified in the Treaties. In sum, the Treaty of Amsterdam therefore consolidated the rule of law and tied it to a number of new functions within the Treaties.

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[34] Ibid. para. 23 (emphasis added).
[35] E. Wennerström (2007), *The Rule of Law and the European Union*, p. 117.
[36] Article 6(1) TEU of the Treaty of Amsterdam (emphasis added).
[37] European Council, *Conclusions of the Presidency - Copenhagen*, SN 180/1/93 REV 1, 21-22 June 1993, p. 13.

Following the entry into force of the Lisbon Treaty in 2009, the rule of law was given its current role as one of the founding values of the Union. The previous Article 6(1) TEU of the Treaty of Amsterdam was accordingly changed into the existent Article 2 TEU:

> 'The Union is founded on the *values* of respect for human dignity, freedom, democracy, equality, *the rule of law* and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'[38]

The Lisbon Treaty thereby changed the description of the rule of law from 'principle' to 'value'. It is not clear, however, whether this vocabulary shift was intended to have any legal significance or meaning. For example, the Preamble of the Charter still denotes the rule of law as a principle, despite the phrasing in Article 2 TEU. The Treaties themselves are therefore not entirely consistent in this regard, and the Court of Justice has not addressed the legal relevance (if any) of the different wording. In the legal literature, the general view appears to be that the values listed in Article 2 should still be understood as principles, and that the rephrasing did not altered their legal significance or meaning.[39]

Finally, under the current Treaties the rule of law is also an *objective* which the Union must promote among its other values, as stipulated by Articles 3(1) and 13 TEU. The provisions thereby indicate that mere respect for the rule of law is not in itself sufficient under the current Treaties; the value must also be actively encouraged.[40] This can in turn be seen as another expression of the holistic approach towards the rule of law that has progressively evolved within the EU ever since *Les Verts*. Thus, in its contemporary form the rule of law is intended to underpin all sorts of actions adopted by both the Union itself as well as its Member States. The current Treaties thereby clearly bestow the rule of law with a foundational and dominant character within the EU.

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[38] Article 2 TEU (emphasis added).

[39] L. Pech (2010), 'A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' in: *European Constitutional Law Review*, vol 6(3), pp. 366-367; A. von Bogdandy (2010), 'Founding Principles' in: *Principles of European Constitutional Law*, A. von Bogdandy & J. Bast (eds.), p. 22.

[40] For a broader discussion, see C. Hillion (2016), 'Overseeing the Rule of Law in the European Union: Legal Mandate and Means' in: *European Policy Analysis*, vol. 2016:1, Swedish Institute for European Policy Studies, pp. 5-6

2.3 Article 2 TEU: A Judicially Enforceable Provision?

As can be drawn from the above, the predominant rule of law provision under current EU primary law is Article 2 TEU, which enshrines the concept as a foundational value to the Union. The article thereby forms the basis for the EU rule of law and functions as the concept's main reference point within the Union's legal framework. However, in substantive terms the article is vague, meaning that it is difficult to ascertain the precise legal effects that arise under the provision.[41] By way of illustration, the Council Legal Service has argued in a 2014 opinion:

> 'Article 2 TEU *does not confer any material competence* upon the Union but, similarly to the Charter provisions, it lists certain *values that ought to be respected* by the institutions of the Union and by its Member States when they act within the limits of the powers conferred on the Union in the treaties, and without affecting their limits.'[42]

The opinion concerned whether the Commission's 2014 Rule of Law Framework, a soft law instrument created as a step prior to Article 7 TEU, had legal basis in the Treaties. Based on the reasoning cited above the Council Legal Service concluded that it did not. In essence, the Legal Service argued that there was no basis in the Treaties for the Union to adopt any additional measures directly on Article 2 TEU, besides the procedure already laid down in Article 7.[43] In other words, the legal effects of Article 2 are limited and essentially confined to the Article 7 mechanism, according to the Legal Service. Although the opinion is not binding, it is interesting to note as it implies that Article 2 TEU should mainly be understood as a normative provision, rather than a substantive legal one.

This is further supported by the fact that Article 2 TEU is generally considered to lack justiciability.[44] That is, it cannot in itself be used as the legal basis in an infringement procedure against a Member State. Two arguments can be mentioned in support of this

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[41] Cf. COREPER, *Note on Council Conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental rights of the European Union*, doc. 10168/13, 29 May 2013, point 9.

[42] Council of the European Union, *Opinion of the Legal Service: Commission's Communication on a new EU Framework to strengthen the Rule of Law – compatibility with the Treaties*, doc. 10296/14, 27 May 2014, para. 16 (emphasis added).

[43] Ibid. para. 28.

[44] See e.g. D. Kochenov & L. Pech (2015), 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality', in: *European Constitutional Law Review*, vol. 11, p. 520; Hillion (2016), *supra* note 40, pp. 5-9.

notion. Firstly, according Article 258 TFEU an infringement procedure requires the breach of an *obligation*, which refers to a specific and distinct violation of EU law.[45] By comparison, the values listed in Article 2 TEU are vague and open-ended, which can be interpreted as precluding the provision from being used in an infringement procedure. Secondly, it can be argued that Article 7 TEU operates as a *lex specialis* with regard to Article 2 TEU, limiting the room for any judicial enforcement of the provision as such. This is supported by the fact that Article 7 was created as a specific mechanism for addressing breaches of the values in Article 2, a procedure governed by the Council and the European Council – not the Court of Justice.[46] Hence, it can be argued that the enforcement of the values in Article 2 is in principle a political issue, not a judicial one.

All considered, it can be concluded that in spite of its important and foundational character, Article 2 TEU is generally not understood as a judicially enforceable provision. This is important to note, as it implies that the value of the rule of law in Article 2 has to be combined with a more concrete provision of EU law in order to be capable of being deployed within judicial procedures.

2.4 Defining the Rule of Law in the EU Framework

The key EU rule of law provisions examined above have primarily emphasised the importance of the concept within the Union, without providing any guidance on its substance or meaning. As mentioned, there is also no universal definition of the content of the rule of law. There is, however, a set of soft law instruments within the EU framework, containing working definitions of the concept. These instruments thereby offer a starting point for understanding the overarching meaning of the EU rule of law.

The most central instrument is the Commission's 2014 Rule of Law Framework.[47] As mentioned, the Framework establishes a pre-Article 7 TEU procedure, which is aimed at addressing emerging threats to the rule of law in Member States through dialogue. The

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[45] L.W. Gormley (2017), 'Infringement Proceedings', in: *Enforcement of EU Law and Values – Ensuring Member States' Compliance*, A. Jakab & D Kochenov (eds.), pp. 75-77.
[46] Ibid. See also P. van Elsuwege & F. Gremmelprez (2020), 'Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice' in: *European Constitutional Law Review*, vol. 16, pp. 8-10.
[47] European Commission, *Communication from the Commission to the European Parliament and the Council – A new EU framework to strengthen the Rule of Law*, COM(2014) 158 final, 11 March 2014.

main part of the Framework of interest for understanding the EU rule of law is its annex, which contains a list of 'noteworthy' concepts and principles regarding the rule of law. The list is derived from the case law of the Court of Justice and the ECtHR and is reflected at the level of the Council of Europe.[48] Indeed, it largely corresponds to a similar list previously published by the Council of Europe's Venice Commission, an expert body on constitutional matters.[49] The Framework's list includes:

- The principle of legality,
- Legal certainty,
- Prohibition of arbitrariness of the executive powers,
- Independent and effective judicial review, including respect for fundamental rights,
- Equality before the law.[50]

As mentioned, the Council Legal Service has questioned the legality of the Rule of Law Framework. However, no criticism was directed at the list of principles or the Commission's understanding of the rule of law.[51] In addition, the list's legal legitimacy is underpinned by the fact that its content draws upon established case law as well as the work of the Venice Commission, which indicates that it is built upon a solid legal foundation. Importantly, the Commission has also further reinforced the normative value of the list by repeatedly using it as a working definition for the rule of law in subsequent EU soft law instruments.[52] Considered together, these factors indicate that the listed principles can be regarded as a reflection of the core understanding of the EU rule of law, in general terms. While the list should not be regarded as exhaustive, it thus provides an overarching understanding of how the rule of law is generally defined in EU law.

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[48] European Commission, *Annexes to the Communication from the Commission to the European Parliament and the Council – A new EU framework to strengthen the Rule of Law*, COM(2014) 158 final, Annexes 1 to 2, 11 March 2014, pp. 2-3.
[49] Council of Europe, Venice Commission, *Report on the Rule of Law – Adopted by the Venice Commission at its 86th plenary session*, CDL-AD(2011)003rev, 25-26 March 2011, pp. 10-13.
[50] European Commission, *supra* note 48, pp. 1-2.
[51] Cf. Council of the European Union, *supra* note 42, para. 28.
[52] See e.g. European Commission, *supra* note 2, pp. 1-2; European Commission, *Communication from the Commission to the European Parliament, the European Council and the Council – Further strengthening the Rule of Law within the Union: State of play and possible next steps*, COM(2019) 163 final, 3 April 2019, pp. 1-2.

2.5 Analysis: The Status and Meaning of the EU Rule of Law

The outline of the development of the rule of law in EU primary law clearly illustrates how the concept has gradually evolved into a predominant principle within the EU legal order. Under the current Treaties, the rule of law thus fulfils a multifaceted role, which is evidenced by its coinciding status as a founding value, a Union objective and as a benchmark for countries seeking to join the EU. The concept's development in EU law thereby underscores how the rule of law has become increasingly intertwined with the very fabric of the Union, as well as its identity.

Nevertheless, the enshrinement of the rule of law in Article 2 TEU does not appear to render the concept judicially enforceable, at least not by virtue of that provision alone. Rather, Article 2 seems to be understood primarily as an expression of a normative value, as opposed to a legal norm. In addition, the fact that Article 7 TEU was instituted as a specific political mechanism to protect the founding values of the Union, suggests that the enforcement of those values has principally been regarded as a political issue, not a judicial one. Hence, it can be concluded that in order for the value of the rule of law in Article 2 TEU to be operationalised within judicial proceedings, it has to be combined with a more concrete legal norm of EU law.

As regards the general definition of the EU rule of law, the Commission's Rule of Law Framework provides a solid foundation for understanding the concept's most essential features. The definition is broad and includes a number of substantive components, which also function as self-standing principles in Union law. Notably, all principles appear to have one central and overarching aim in common: to prevent arbitrariness in the use of power. Thus, the existence of independent and properly functioning courts naturally forms one of the core components of the rule of law, as a fundamental safeguard against arbitrariness and unequal enforcement of the law. This is also explicit in the Commission's definition through the inclusion of the principle of 'independent judicial review', which implies that decisions must be capable of being judicially scrutinised by independent courts. All considered, the chosen definition provides a solid starting point for understanding the rule of law in the EU and will therefore form the basis of the concept in the present thesis.

3 Effective Judicial Protection and Article 19(1) TEU

3.1 Introduction

In this chapter, the origins and purpose behind the second subparagraph of Article 19(1) TEU, as well as the meaning of the related general principle of effective judicial protection and Article 47 of the Charter, will be explored. The aim of the chapter is thereby to provide a basis for analysing the recent case law of the Court of Justice. Importantly, the chapter will therefore study the concepts without reference to the recent case law development, which will be analysed separately further below. The chapter is finalised with an analysis of Article 19(1), effective judicial protection and their relation to the rule of law.

3.2 The Second Subparagraph of Article 19(1) TEU

3.2.1 General Remarks

The second subparagraph of Article 19(1) TEU was introduced to the EU legal framework with the entry into force of the Lisbon Treaty in 2009. It is therefore, in itself, a relatively new addition to EU law and was notably inserted into the existing provision governing the overarching duties of the Court of Justice. In full, Article 19(1) provides:

> 'The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.
>
> Member States shall provide *remedies sufficient to ensure effective legal protection* in the fields covered by Union law.'[53]

On the surface, the wording of the article appears to give expression to the overall division of competences between the Court of Justice and the Member States; the Court interprets EU law and the Member States ensure that the law can be enforced.[54] In this respect the second subparagraph can be regarded as a more concrete manifestation of the principle

[53] Article 19(1) TEU (emphasis added).
[54] T. Tridimas (2018), 'The Court of Justice of the European Union' in: *Oxford Principles of European Union Law*, R. Schütze & T. Tridimas (eds.), p. 583.

of sincere cooperation set out in Article 4(3) TEU. This principle imposes a duty on Member States to take all appropriate measures to guarantee the fulfilment of its obligations under EU law, including the obligation to ensure the judicial enforcement of Union law before national courts.[55] The second subparagraph underscores this message and can thus be viewed as a reflection of the Union's decentralised justice system, which implies that the main application of EU law is done on the national levels.[56]

As concerns the purpose and more precise meaning of the second subparagraph of Article 19(1) TEU, the wording of the provision alone does not provide clear guidance. Similar to many Treaty provisions, the phrasing of the paragraph is vague and open-ended. More specifically, it is difficult to ascertain what precise measures are covered by the word 'remedies' and to establish which ones are 'sufficient to ensure effective legal protection' solely based on a literal interpretation of the provision. Moreover, the context of the second subparagraph does not shed further light on its practical meaning or function either; the subparagraph is concerned with the Member States, while the other parts of Article 19 focus purely on the Court of Justice. To understand the more precise purpose and significance of the second subparagraph it is therefore necessary to look beyond merely the wording and context of the provision.

3.2.2 The Origins and Objectives of the Second Subparagraph

As is settled case law by the Court of Justice, the interpretation of an EU law provision must be done in light of its objectives and purposes, including its origins.[57] A useful starting point for understanding the second subparagraph of Article 19(1) TEU is therefore to consider *why* the provision was introduced in the first place. The answer to this can be found in the *travaux préparatoires* to the paragraph, namely the reports from the Discussion Circle on the Court of Justice.[58] This Circle was established to consider judicial matters in what later came to be the Lisbon Treaty and their reports thus offer valuable insight into the motives that underpinned specific provisions. The interpretative

[55] Case 45/76 *Comet* [1976] EU:C:1976:191, para. 12; Case C-213/89 *Factortame and Others* [1990] EU:C:1990:257, para. 19; Case C-432/05 *Unibet* [2007] EU:C:2007:163, para 38.
[56] This is further explored in the next chapter, see in particular section 4.4.
[57] See Case C-621/18 *Wightman and Others* [2018] EU:C:2018:99, para. 47 and the case law cited.
[58] For an overview on the Discussion Circle, see P. Craig (2010), *The Lisbon Treaty: Law, Politics and Treaty Reform*, pp. 134-135.

value of these reports is accentuated by the fact that the Court has cited and used them in its own legal reasoning when identifying the objectives behind specific provisions.[59]

In general, the second subparagraph of Article 19(1) TEU received scarce attention in the deliberations of the Discussion Circle.[60] At first glance, the reports indicate that the provision was included solely to endorse the Union's decentralised justice system, as mentioned above.[61] Nevertheless, a combined reading of the reports indicates that a more specific purpose behind the provision was also to *codify* the Court of Justice's case law on effective judicial protection, a long-standing general principle of EU law. For instance, the former President of the Court of Justice made the following remark in his report:

> '[N]o specific comment is called for on the suggestion that the Member States' obligation to ensure that there are effective legal remedies before their own courts – *an obligation recognised in the case law* – should be written into the Treaty.'[62]

This position was notably reiterated in the final report of the Discussion Circle, where key judgments on judicial protection, delivered in the years preceding the Lisbon Treaty, were cited.[63] In those judgments, the language used by the Court largely corresponds to what came to be the wording of the second subparagraph.[64] The Discussion Circle thereby clearly indicated that the content of the provision was in fact already binding through case law. This in turn implies that the intention behind the second subparagraph of Article 19(1) TEU in itself was merely to give formal recognition to the Court's case law concerning the general principle. Consequently, the purpose of the provision, at the time of its introduction, was *not* to alter the established law or to create new rights and obligations, but to underline the existing principle of effective judicial protection.

This is also how the second subparagraph of Article 19(1) was generally received in the legal literature in the aftermath of the entry into force of the Lisbon Treaty. By way of

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[59] See Case C-583/11 P *Inuit Tapiriit Kanatami* [2013] EU:C:2013:625, para. 59.
[60] Cf. CONV 734/03, *Cover Note on Articles on the Court of Justice and the High Court*, 12 May 2003, pp. 5-6.
[61] CONV 636/03, *Final Report of the Discussion Circle on the Court of Justice*, 25 March 2003, para. 18.
[62] CONV 573/03, *Cover Note on Oral Presentation by M. Gil Carlos Rodríguez Iglesias (President of the Court of Justice)*, 17 February 2003, p. 5 (emphasis added).
[63] CONV 636/03, *supra* note 61, para. 18.
[64] Cf. Case C-50/00 P *UPA v Council* [2002] EU:C:2002:462, para. 41; Case C-263/02 P *Jégo-Quéré* [2004] EU:C:2004:210, para. 31.

illustration, Arnull noted regarding the provision that 'in terms of content, it does not appear to add anything new, merely reiterating the general principle of effective judicial protection.'[65] A similar view on the second subparagraph can be found in various parts of the legal literature and it is in fact noticeable that the provision again received limited attention in and of itself.[66] This further underscores that when the paragraph was inserted into Article 19(1) TEU, it was generally not considered a ground-breaking change of EU law.[67] Rather, in line with the *travaux préparatoires*, it was simply viewed as confirming facts that were already binding.

In light of the above, it can be concluded that the original purpose behind the second subparagraph of Article 19(1) TEU was to codify the principle of effective judicial protection and emphasise the decentralised justice system within the Union. Importantly, the provision was thereby not intended, or understood, to add any *new* rights or obligations; it merely underscored a principle that was already binding through case law. Thus, it is also clear that the second subparagraph is fundamentally connected to the general principle of effective judicial protection, a principle which is 'reaffirmed' in Article 47 of the Charter.[68] In order to further understand the second subparagraph it is therefore necessary to examine both the general principle and Article 47, especially since these have also been used by the Court in the recent case law.

3.3 The General Principle of Effective Judicial Protection

3.3.1 Development and Main Components

In general terms, the principle of effective judicial protection implies that individuals must be able to enforce rights conferred on them by EU law through adequate procedures and remedies.[69] The principle can thus be seen as a reflection of the maxim *ubi jus ibi*

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[65] Arnull (2013), *supra* note 8, pp. 766-767.
[66] See e.g. R. Barents (2010), 'The Court of Justice after the Lisbon Treaty' in: *Common Market Law Review*, vol. 47, 714-715; S. Prechal (2015), 'Europeanisation of National Administrative Law' in: *Europeanisation of Public Law*, J.H. Jans and Others (eds.), p. 54; M. Bonelli (2019), 'Effective Judicial Protection in EU law: An Evolving Principle of a Constitutional Nature' in: *Review of European Administrative Law*, vol. 12:2, pp. 40-41.
[67] See in particular, Bonelli (2019), *supra* note 66, p. 40.
[68] See Case C-432/05 *Unibet* [2007] EU:C:2007:163, para 37; Joined Cases C-402/05 P and 415/05 P *Kadi* [2008] EU:C:2008:461, para. 335.
[69] R. Ortlep & R. Widdershoven, 'Judicial Protection' in: *Europeanisation of Public Law*, J.H. Jans and Others (eds.), p. 333. See also, A. Arnull (2011), 'The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?' in: *European Law Review*, vol. 36:1, pp. 51-52.

remedium; where there is a right, there must be a remedy. However, the more precise meaning of the principle is not clearly defined and within the literature there are different views on its substantive content.[70] In the following, the principle's development and main components will be therefore be assessed, in order to attempt to clarify its meaning.

The first reference to effective judicial protection was made by the Court of Justice in *Von Colson.*[71] The central question at issue in the case was whether a national remedy for unlawful discrimination satisfied the level of protection prescribed by an EU directive. In its judgment, the Court observed that although the directive in question did not require any specific form of sanction, the national remedies had to 'guarantee real and effective judicial protection.'[72] The national rule at stake, which limited the right to compensation to a purely nominal amount, was not considered sufficient. Effective judicial protection was thereby used as a benchmark for assessing a national procedural rule, with the aim of guaranteeing the individual's right to an adequate remedy.

Subsequently, the principle was significantly developed in *Johnston*.[73] This case concerned a national rule of evidence in the United Kingdom, which in practice deprived the plaintiff the possibility to take judicial action against a discriminatory decision from a national authority. The Court held that such a rule was contrary to Article 6 in Directive 76/207, which required Member States to enable individuals to challenge cases of discrimination through 'judicial process'. It then importantly observed:

> 'The requirement of *judicial control* stipulated by [Article 6 of Directive 76/207] *reflects a general principle of law* which underlies the constitutional traditions common to the Member States. That principle is also laid down in Article 6 and 13 of the [ECHR].'[74]

Article 6 of the directive was therefore simply an expression of effective judicial protection, which the Court, for the first time, elevated to the status of a general constitutional principle, connected to Articles 6 and 13 ECHR. Notably, the Court also developed the substance of effective judicial protection in the case by making clear that

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[70] See e.g. K. Lenaerts and Others (2014), *EU Procedural Law*, pp. 111-114. Cf. Prechal (2015), *supra* note 66, pp. 53-54.
[71] Case 14/83 *Von Colson* [1984] EU:C:1984:153.
[72] Ibid. para. 23
[73] Case 222/84 *Johnston* [1986] EU:C:1986:206.
[74] Ibid. para. 18 (emphasis added).

the individual's right to judicial review and access to court were also central components of the principle.[75] The Court therefore implied that the national rule in question, which limited access to judicial procedures, was also in breach of the principle as such.[76]

In subsequent case law, the Court of Justice continued to develop the scope and substance of effective judicial protection. In *Heylens,* the Court clarified that the principle was applicable even in cases where it was not codified in any secondary law.[77] The Court observed that as soon as EU law conferred rights on individuals, the principle had to apply to ensure the protection of that right, regardless of whether it was enshrined in the applicable secondary law.[78] Based on this broad scope of application, the principle evolved into a wide-ranging standard for assessing national procedural rules. Subsequent references to the principle can thus be found in cases concerning, *inter alia*, the burden of proof under national law[79], the adequacy of national appeals procedures[80] and the judicial reviewability of certain decisions by national authorities.[81]

The principle of effective judicial protection is therefore not static but has been applied and developed by the Court in a flexible fashion, adapting it to various situations in which individuals are attempting to enforce rights derived from EU law. As can be drawn from the above, the Court has made clear that effective judicial protection may comprise elements such as the individual's right to an adequate remedy, judicial review and actual access to courts. However, the Court has also notably included other components under the principle. In *Otis and Others*, for example, it held that effective judicial protection also encompasses the rights of defence, equality of arms and the right to be advised, defended and represented.[82] The precise content of the principle of effective judicial protection is thus not fully defined, which explains the lack of an exhaustive and generally accepted definition of the principle's exact meaning and components.

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[75] Ibid. para. 19.
[76] Ibid. para. 21.
[77] Case 222/86 *UNECTEF v Heylens* [1986] EU:C:1986:442, para. 14.
[78] Ibid.
[79] Case 127/92 *Enderby* [1993] EU:C:1993:859, para. 14.
[80] Case C-424/99 *Commission v Austria* [2001] EU:C:2001:642, para. 42.
[81] Case C-104/91 *Borell and Others* [1992] EU:C:1992:202, para. 15.
[82] Case C-199/11 *Otis and Others* [2012] EU:C:2012:684, para. 48.

Hence, it can be concluded that the principle of effective judicial protection is best understood as an umbrella principle. It thereby comprises various substantive elements, which, in one way or another, aim to ensure that individuals have means to enforce rights derived from EU law.[83] In this regard, it is clear that the principle, as developed by the Court, has a broad and flexible nature, which notably implies that there is a wide margin for interpretation in relation to its content. Nevertheless, the case law also illustrates that the Court has solely used the principle in relation to national *procedural* rules, as a general standard for assessing their adequacy. In addition, the Court has articulated some explicit boundaries to the principle. For example, the Court held in *Unibet* that the principle does not require Member States to create any *new* remedies before national courts.[84] Rather, it primarily aims to ensure the adequacy of those already in existence.

3.3.2 Relationship with Effectiveness and Equivalence

The outline above has showed that effective judicial protection has operated in EU law as a flexible benchmark for evaluating national procedural rules. However, the concept's relationship with the two basic procedural principles of EU law, namely the principles of effectiveness and equivalence, is not clear. These two principles emanate from the landmark case *Rewe*, where the Court held that unless EU law provides otherwise, it is the national procedures of the Member States that will govern the enforcement of EU law before national courts.[85] This is known as national procedural autonomy. However, the Court added that these procedures must not treat EU-based claims less favourably than claims based on national law (equivalence), nor render the enforcement of EU law impossible or excessively difficult (effectiveness).[86] In essence, Member States are thus free to use their own procedural rules, as long as these rules ensure that EU law can be enforced in practice before the domestic courts.

On the one hand, effective judicial protection can be viewed as a more robust expression of the principle of effectiveness, since it also implies that rights based on EU law must be

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[83] See further S. Prechal (2015), 'The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?' in: *Fundamental Rights in International and European Law*, C. Paulssen and Others (eds.), p. 149.
[84] Case C-432/05 *Unibet* [2007] EU:C:2007:163, para. 65. See also, Case C-583/11 P *Inuit Tapiriit Kanatami* [2013] EU:C:2013:625, para 103.
[85] Case 33/76 *Rewe* [1976] EU:C:1976:88, para. 5.
[86] Ibid. See also more recently, Case C-234/17 *XC and Others* [2018] EU:C:2018:853, para. 22.

capable of being effectively enforced in domestic procedures. This view is supported by a number of scholars in the legal discourse.[87] On the other hand, the Court of Justice itself is seemingly inconsistent when dealing with the different principles. In *Alassini and Others*, the Court suggests that effective judicial protection is a separate principle from effectiveness and equivalence.[88] Conversely, in *Orizzonte Salute* the Court implies that judicial protection in fact springs from, and forms a part of, the principle of effectiveness.[89] It is therefore not entirely clear how the relationship between the three principles is to be understood, which notably adds to the somewhat vague nature of the principle of effective judicial protection.

3.3.3 The Scope of Effective Judicial Protection as a General Principle

The examination above shows how the principle of effective judicial protection has gradually evolved within EU law into a wide-ranging general standard for assessing national procedures and remedies. The Court's case law clearly illustrates that the general principle thereby covers a range of different substantive components, many of which can also function as self-standing rights and principles. Consequently, effective judicial protection must be understood as an umbrella principle, with a broad scope of application and content. Nonetheless, the exact scope of the principle is difficult to establish. The flexible and somewhat loose interpretation used by the Court, as well as the principle's ambiguous relationship with other procedural principles, implies that the precise limits of effective judicial protection are not fully determined. On the contrary, there appears to be significant room for interpretation under the general principle.

Having thus outlined some of the central features of the general principle, the examination will now focus on Article 47 of the Charter. As the Court has repeatedly underscored, this provision reaffirms and gives specific expression to the general principle and it may therefore enhance the understanding of effective judicial protection.[90] As noted, the provision has also been used in the recent case law concerning Article 19(1) TEU. In the

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[87] See e.g. S. Prechal & R. Widderhoven (2011), 'Redefining the Relationship between "Rewe-effectiveness" and Effective Judicial Protection' in: *Review of European Administrative Law*, vol. 4:2, p. 39; Lenaerts and Others (2014), *supra* note 70, p. 110; Bonelli (2019), *supra* note 66, p. 39-40.
[88] Joined Cases C-317/08-C-320/08 *Alanassi and Others* [2010] EU:C:2010:146, para. 49.
[89] Case C-61/14 *Orizzonte Salute* [2015] EU:C:2015:655, para. 48.
[90] Joined Cases C-402/05 P and 415/05 P *Kadi* [2008] EU:C:2008:461, para. 335; Case C-389/10 P *KME Germany* [2011] EU:C:2011:816, para. 119.

following, the field of application and main components of Article 47 of the Charter will thus be assessed.

3.4 Article 47 of the Charter

3.4.1 Field of Application

With the entry into force of the Lisbon Treaty in 2009, the EU Charter of Fundamental Rights became legally binding within the Union.[91] Pursuant to Article 6(1) TEU, the Charter enjoys the same legal value as the Treaties, and it is thereby part of EU primary law. Nevertheless, the Charter does not extend the scope of EU law nor the competences awarded to the Union beyond what is already provided for by the Treaties, as stated in Article 51(2) of the Charter. In addition, Member States are bound by the Charter 'only when they are implementing Union law', according to Article 51(1). The meaning of this limitation was clarified in the case *Åkerberg Fransson*, where the Court observed:

> 'Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. *The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter*.'[92]

In other words, the scope of EU law determines that of the Charter; whenever a situation is covered by EU law, the Charter applies.[93] This essentially means that the Charter is applicable in cases where there is a sufficient link between the national legislation or case at issue and another provision of Union law (outside the Charter). In practice it is therefore necessary to assess whether a Member State, including its national authorities, is fulfilling an obligation imposed by EU law in the concrete case at hand.[94] A clear-cut example of a situation where the Charter thus applies is when a Member State is implementing or

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[91] E. Spaveta (2020), 'Fundamental Rights in the European Union' in: *European Union Law*, C. Barnard & S. Peers (eds.), p. 258.
[92] Case C-617/10 *Åkerberg Fransson* [2013] EU:C:2013:105, para. 21 (emphasis added).
[93] K. Lenaerts & J.A. Guittérrez-Fons (2014), 'The Place of the Charter in the EU Constitutional Edifice' in: *The EU Charter of Fundamental Rights: A Commentary*, S. Peers and Others (eds.), p. 1568.
[94] Case C-206/13 *Siragusa* EU:C:2014:126, para. 25. See further S. Prechal (2015), 'The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?' in: *Fundamental Rights in International and European Law*, C. Paulssen and Others (eds.), p. 146.

giving effect to directives or regulations. On the contrary, if a national measure has no connection with another provision of EU law, the Charter cannot be applied.

As regards Article 47 of the Charter, this provision applies wherever EU law guarantees 'rights and freedoms.' This is evidently a broad scope of application and in practice entails that Article 47 will automatically apply if the Charter is deemed applicable in the first place.[95] In terms of substantive content, the provision stipulates that everyone has the right to an effective remedy in accordance with the requirements laid down in the article. This notably includes the right to a fair trial and to an independent and impartial tribunal. Although these three components – effective remedy, fair trial and judicial independence – are thus connected, they can also be viewed as individual parts within the provision. The outline below will therefore consider them separately.

For the sake of completeness, it should be emphasised that Articles 6 and 13 ECHR served as specific sources of inspiration to Article 47, as previously noted. However, the level of protection offered by Article 47 is widely considered higher in comparison with the corresponding rights in the ECHR.[96] This is partly due to the fact that Article 47 guarantees an effective remedy before a 'tribunal', in contrast with a 'national authority' as stipulated by Article 13 ECHR. Furthermore, unlike Article 6 ECHR, the right to a fair trial in Article 47 is not limited to cases concerning civil rights and obligations and criminal charges. In line with Article 52(3) of the Charter, effective judicial protection in the Charter has thus been construed in more robust terms than the ECHR.

3.4.2 An Effective Remedy

The right to an effective remedy encased in Article 47 of the Charter requires, in the first place, that individuals whose rights are violated are entitled to reparation proportional to the damage suffered.[97] This aspect can be clearly illustrated in relation to the abovementioned case *Von Colson*, where the reparation for unlawful discrimination under the relevant national law consisted only of reimbursement for minimal travel expenses.[98]

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[95] P. Aalto and Others (2014), 'Article 47 – Right to an Effective Remedy and a Fair Trial' in: *The EU Charter of Fundamental Rights: A Commentary*, S. Peers and Others (eds.), p. 1199.
[96] Explanations Relating to the Charter of Fundamental Rights, *Explanation on Article 47 – Right to an effective remedy and to a fair trial*, doc. 2007/C 303/02; Bonelli (2019), *supra* note 66, p. 41.
[97] Aalto and Others (2014), *supra* note 95, p. 1201.
[98] Case 14/83 *Von Colson* [1984] EU:C:1984:153.

According to the Court, such a nominal amount was not sufficient as a remedy to ensure the level of protection prescribed by EU law.[99] The national rules on compensation and sanctions must therefore be *adequate* to address violations of rights, in order to comply with the right to an effective remedy in Article 47.[100] However, the remedy does not have to be monetary but can consist of various other measures aimed at eliminating the wrong, the choice of which is at the discretion of the Member States.[101]

Furthermore, the right to an effective remedy under Article 47 of the Charter also requires that individuals must have fair possibilities of bringing cases to court for judicial scrutiny, i.e. have access to judicial review.[102] The national systems of remedies and procedures must therefore enable a review of the legality of a decision, which in turn necessitates that there be actual access to courts. In *Schrems I*, the Court of Justice thus held that any national legislation which does not provide avenues for individuals to pursue legal remedies, in order to protect his or her rights, violates the essence of Article 47.[103] Moreover, in order for judicial scrutiny to be effective, individuals must be able to obtain the reasons for decisions taken in relation to them, thus enabling them to decide whether it is worth applying to the courts. [104]

3.4.3 A Fair and Public Hearing Within Reasonable Time

Pursuant to Article 47 of the Charter everyone has the right to a fair hearing. To begin with, a fair proceeding within the meaning of the provision must be adversarial. According to the Court of Justice, this entails that the parties must have the right to examine all the documents and observations presented to the court for the purpose of influencing its decision and to comment on them.[105] In addition, it requires the courts to inform the parties of the dispute and invite them to set out their views on the matter, with

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[99] Ibid. para. 24.
[100] Case C-271/91 *Marshall* [1993] EU:C:1993:335, para. 23.
[101] See Case 68/88 *Commission v Greece* [1989] EU:C:1989:339, para. 24. For a broader discussion, see Aalto and Others (2014), *supra* note 95, p. 1201-1202.
[102] H. Hofmann (2020), 'General principles of EU law and EU administrative law' in: *European Union Law*, C. Barnard & S. Peers (eds.), p. 236.
[103] Case C-362/14 *Schrems v Data Protection Commissioner* [2015] EU:C:2015:650, para. 95.
[104] See Case C-372/09 *Josep Peñarroja Fa* [2011] EU:C:2011:157, para. 63.
[105] Case C-450/06 *Varec* [2008] EU:C: 2008:91, para. 45; Case C-89/08 *Commission v Ireland and Others* [2009] EU:C:2009:742, para. 52.

the opportunity to challenge the views of the other party.[106] Put differently, it is thus about understanding the case against you and being able to challenge it.

Moreover, the principle of equality of arms is another key component of a fair proceeding in Article 47. This principle seeks to ensure a fair balance between the parties by requiring procedural equality. As stated by the Court in *Otis and Others*, the parties to the proceeding must therefore be given equal opportunity to present their cases in a way that does not place either party under a substantial disadvantage in relation to the other.[107] What precise procedural safeguards this requires is not specified by the principle, but depends on the nature of the case and the issue between the parties.[108]

The right to a fair hearing also requires the courts to give reasons for their judgments. In *ASML*, the Court of Justice observed that this obligation entails that 'all judgments be reasoned to enable the defendant to see why judgment has been pronounced against him and to bring an appropriate and effective appeal against it'.[109] In other words, it is the same type of obligation that the Court has articulated under the general right to an effective remedy, namely that individuals must be able to obtain reasons for decisions taken against them. Nonetheless, the extent of the duty to give reasons may vary depending on the nature of the decisions and the circumstances of the case at hand.

Lastly, Article 47 stipulates a right to a public hearing, within a reasonable time. The former aspect is somewhat self-explanatory and aims to ensure public scrutiny over judicial proceedings. Furthermore, what constitutes a 'reasonable time' has not been set at a fixed time limit but is assessed on a case-by-case basis in light of the specific circumstances of the case at hand, in particular its importance and complexity.[110]

3.4.4 An Independent and Impartial Tribunal

The notion of a 'tribunal' referred to in Article 47 of the Charter is to be understood in the same manner as the term 'court or tribunal' used in Article 267 TFEU, which concerns the preliminary ruling mechanism.[111] This means that the Court of Justice's case law

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[106] Case C-472/11 *Banif Plus Bank* [2013] EU:C:2013:88, para. 31.
[107] Case C-199/11 *Otis and Others* [2012] EU:C:2012:684, para. 71.
[108] See further, Aalto and Others (2014), *supra* note 95, p. 1263-1264.
[109] Case C-283/05 *ASML Netherlands BV* [2006] EU:C:2006:787, para. 28.
[110] See Case C-270/99 P *Z v Parliament* [2001] EU:C:2001:639, para. 24.
[111] Aalto and Others (2014), *supra* note 95, p. 1250-1251.

relating to the definition of a 'court or tribunal' in Article 267 is also relevant with regard to Article 47 of the Charter. In determining whether a body is thus a court or tribunal within the meaning of EU law, the Court will take a number of factors into account, an analysis of which will be done further below.[112]

Notably, however, Article 47 of the Charter explicitly emphasises judicial independence as a requirement on the national tribunals, underscoring the importance of the criterion. According to the Court of Justice, such independence is inherent to the task of adjudication and 'involves primarily an authority acting as a third party in relation to the authority which adopted the contested decision'.[113] More specifically, the Court views the independence of a national court or tribunal in light of two aspects. Firstly, the body in question must enjoy *external* independence, entailing that it must be protected from all forms of outside interference or pressure which could jeopardise the independent judgment of its members.[114] In essence, this requires that the body is autonomous in relation to other government bodies and that national rules safeguard the integrity of the judges, for example by shielding them against arbitrary removal from office.[115]

Secondly, the body in question must also have *internal* independence, which is related to impartiality and seeks to guarantee that the judges have the same distance to the interest of the parties in all cases.[116] Objectivity is thus necessary, and the judges should have no interest in the outcome of the proceedings before them apart from a strict application of the relevant legal rules. Should a national body fall short on any of these two aspects, it will not be considered independent and, consequently, cannot constitute a 'court or tribunal' under Article 47 of the Charter or EU law in general.

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[112] See further section 4.4.1.
[113] Case C-24/92 *Corbiau* [1993] EU:C:1993:118, para. 15.
[114] Case C-506/04 *Wilson* [2006] EU:C:2006:587, para. 51.
[115] Ibid. See also Case C-58/13 *Torresi & Torresi* [2014] EU:C:2014:2088, para. 22.
[116] C-506/04 *Wilson* [2006] EU:C:2006:587,para. 52.

3.5 Analysis: Article 19(1) TEU, Effective Judicial Protection and the Rule of Law

This chapter has illustrated a number of components essential for understanding the second subparagraph of Article 19(1) TEU, as well as the related general principle of effective judicial protection and Article 47 of the Charter. Regarding Article 19(1) TEU in itself, the *travaux préparatoires* indicate that the original purpose behind the provision was to codify the Court's existing case law on judicial protection and underscore the Union's decentralised system. The provision was thus not intended or understood as a ground-breaking addition to EU law, which is illustrated both by the preparatory documents and the paragraph's general reception amongst legal scholars. Instead, the second subparagraph was principally considered as a mere reflection of the principle of effective judicial protection, creating no new rights or obligations in and of itself.

As regards the substance of the second subparagraph of Article 19(1) TEU, the *travaux préparatoires* do not shed light on the meaning of the Member States' duty to 'provide remedies sufficient to ensure effective legal protection'. This obligation is, however, given more substance when considered in light of the Court's case law on the general principle of effective judicial protection. The examination has showed that the principle is wide-ranging, comprising a number of different components which, in different ways, relate to the individual's ability to enforce rights conferred by EU law. The principle thus includes, *inter alia*, the right to adequate remedies, judicial review and actual access to courts. In practice, effective judicial protection thereby places standards on the Member States' domestic procedures and remedies, which entails that it counterbalances national procedural autonomy. Importantly, however, the precise scope and meaning of the general principle is difficult to determine, which leaves a broad room for interpretation.

In this respect, Article 47 of the Charter contains a much more detailed and concrete expression of effective judicial protection. The provision contains a clear number of components, which have been further developed and clarified by the Court. Notably, Article 47 explicitly includes judicial independence as an inherent part of the right to an effective remedy. This aspect is not mentioned in the original sources relating to Article 19(1) TEU and is also not clearly visible in the general case law concerning the principle of effective judicial protection. However, the use of Article 47 is limited, and thus also its practical impact. The detailed requirements under the provision are only enforceable

if another provision of Union law is applicable in the first place, pursuant to Article 51(1) of the Charter. The possibility to enforce the components of Article 47, including judicial independence, is thus largely dependent upon the circumstances of the individual case.

Lastly, it can be underscored that the present chapter has also illustrated the connection between the second subparagraph of Article 19(1) TEU and the EU rule of law, as previously defined. Indeed, the right to effective judicial protection expressed in the provision is in practice a *precondition* for many of the rule of law components identified above. For example, the practical value of equality before law and fundamental rights would be severely limited if individuals had no adequate means to enforce rights through domestic procedures and remedies. Furthermore, the right to judicial review, a key part of judicial protection, is expressly listed as one of the components of the EU rule of law, which further underlines the connection between the two. Hence, it can be concluded that the second subparagraph, in giving expression to the concept of effective judicial protection, is fundamentally connected to the EU rule of law.

4 The Union's Judicial Architecture

4.1 Introduction

In this chapter, the decentralised judicial architecture of the EU will be further explored, in order to create a context for understanding and analysing the recent case law development on Article 19(1) TEU. Since the topic is wide-ranging, the assessment will primarily focus on some of the basic legal principles and central mechanisms that underpin the relationship between the Court of Justice and the courts of the Member States. The chapter is subsequently finalised with an analysis of the main features that characterise the Union's judicial architecture.

4.2 Basic Principles of EU Law

As mentioned, the decentralised justice system within the EU implies that the principal application of Union law is done at the national levels before the domestic courts.[117] This system fundamentally draws upon a number of basic principles of EU law, which govern the status of that law in the national legal systems and are essential for understanding the Union's justice system. Three principles are particularly central in this regard and they thereby provide a frame for understanding the Union's overarching judicial architecture. The main features of these principles will therefore be delineated below, before some of the more specific tasks of the Court of Justice and the national courts are addressed.

4.2.1 Supremacy of EU Law

The first principle to highlight is the supremacy of EU law.[118] In essence, this principle establishes the hierarchal superiority of Union law over national law in areas where the EU has competence (i.e. subject to the principle of conferral of competences). The basis for the principle was set out by the Court of Justice in the seminal case *Costa v ENEL*.[119] The Court held that the former EEC Treaty had created its *own* legal system, which had become an integral part of the legal systems of the Member States. This was in turn interpreted as meaning that the Member States had limited their sovereign rights in the

[117] Tridimas (2018), *supra* note 54, p. 583. See also, Lenaerts and Others (2014), *supra* note 70, pp. 13-15.
[118] Also referred to as the principle of the primacy of EU law.
[119] Case 6/64 *Flaminio Costa v ENEL* [1964] EU:C:1964:66.

fields covered by EU law and that they had thereby accepted that national measures could not take precedence.[120] The effect of the principle was later reinforced in *Internationale Handelsgessellschaft*, where the Court ruled that not even fundamental rights contained in national constitutions had primacy over Union law.[121] The basic premise of the principle is therefore that EU law prevails over all national statutes, in the case of a conflict in areas where the Union has competence.

One of the most important consequences of the principle of supremacy is that it entails a duty for national courts to set aside any national law that may conflict with EU law. This is part of settled case law from the Court of Justice, where it has also been made clear that this power extends to *all* domestic courts when a conflict between EU and national law arises, not only the national constitutional courts.[122] The principle thus empowers national courts, regardless of their status in the domestic system, to set aside any and all national statutes that may harm the full effect of EU law.

4.2.2 Doctrine of Direct Effect

The second noteworthy principle is the doctrine of direct effect, which is closely connected with the supremacy of EU law. This doctrine stems from the landmark case *Van Gend en Loos,* where the central question at issue was whether EU law conferred rights on individuals and whether they could rely upon these rights directly before national courts.[123] The Court of Justice held that Union law, as a new legal order, was intended to grant rights to individuals *independently* of the national legislation of the Member States, rights that could consequently be invoked before national courts.[124] The essence of direct effect is therefore that EU provisions, in particular directives, may become an immediate source of law that can be relied on directly at the national levels. In such cases, no further implementation act is necessary for its application.

In subsequent case law, the Court has established that virtually all EU legal instruments *may* be granted direct effect; from Treaty provision and regulations to directives and

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[120] Ibid. pp. 593-594.
[121] Case 11/70 *Internationale Handelsgessellschaft* [1970] EU:C:1970:114, para. 3.
[122] Case 106/77 *Simmenthal* [1978] EU:C:1978:49, paras. 21-24; and more recently Case C-378/17 *Commissioner of Garda Síochána* [2018] EU:C:2018:979, paras. 35-38; Case C-573/17 *Poplawski* [2019] EU:C:2019:530, para. 58.
[123] Case 26/62 *Van Gend en Loos* [1963] EU:C:1963:1, p. 3.
[124] Ibid. p. 12.

decisions.[125] The exact conditions that must be met for a provision to be given such effect vary depending on the legal instrument, but a fundamental requirement is that it must be sufficiently clear and unconditional.[126] This means that an EU law provision may have full effect in the national legal system even if it has not been implemented in national law, provided it meets the conditions of direct effect. An overarching consequence of the doctrine is thereby that every national court must be prepared to directly apply and give effect to EU law, which can also be relied on by individuals even though there is not necessarily a corresponding national statute.

4.2.3 Consistent Interpretation

The third basic principle to underscore is that of consistent interpretation. This principle emanates from the abovementioned case *Von Colson* and entails a duty on national courts and authorities to interpret domestic law, as far as possible, in light of and in conformity with EU law.[127] The duty can be seen as a direct consequence of the principle of sincere cooperation in Article 4(3) TEU and it has a vast scope of application. Notably, the Court of Justice has established that the duty of consistent interpretation covers the national legal system *as a whole*, not only specific provisions.[128] National courts are therefore essentially required to interpret *all* national law in accordance with EU law, which in turn means that the courts must always take relevant Union law into consideration when adjudicating.

While it should be noted that the interpretative obligation imposed on national courts is subject to certain limitations, mainly concerned with safeguarding legal certainty, it is nonetheless a far-reaching duty.[129] In practice, the principle means that national courts must always seek to give effect to relevant EU law, not only in itself but also *through* the national provisions. Consistent interpretation can thereby be seen as a step prior to direct effect and supremacy; if a national provision can be interpreted to give effect to an EU statute, it will not be necessary to directly apply the latter nor disapply the national rule.

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[125] See e.g. Case C-41/74 *Van Duyn* [1974] EU:C:1974:133, para. 12; and more recently Case C-18/08 *Foselev* [2008] EU:C:2008:647; Case 585/16 *Alheto* [2018] EU:C:2018:584, paras. 98-99.
[126] Case C-390/18 *X* [2019] EU:C:2019:1112, para. 90. For an overview, see Craig & de Búrca (2020), *supra* note 22, pp. 218-220.
[127] See Case 14/83 *Von Colson* [1984] EU:C:1984:153, para. 26; and more recently C-282/10 *Dominguez* [2012] EU:C:2012:33, para. 24.
[128] Case C-684/16 *Max-Planck* [2018] EU:C:2018:874, paras. 58-60 and the case law cited.
[129] See further Case C-268/06 *Impact* [2008] EU:C:2008:223, para. 100.

An important implication of the principle is thereby that it establishes the national courts as judicial implementers of EU law.

The main features of supremacy, direct effect and consistent interpretation assessed above illustrate the far-reaching impact of EU law in the national legal system, and notably underline the crucial function and duties of the national courts. The latter aspect will be further elaborated upon below, but as a starting point it can be noted that the principles essentially establish the national courts as implementers of EU law. Another notable feature is the fact that all principles were originally articulated and designed by the Court of Justice. They thereby serve as concrete examples of the influential role that the Court has played in the shaping of EU law, an aspect that will now be further examined.

4.3 Centralised Interpretation: The Court of Justice of the European Union

4.3.1 General Mandate of the Court of Justice

As is clear from the sections above, the Court of Justice has played a major role in articulating and developing many of the legal principles and concepts that are now considered cornerstones of the entire EU legal order.[130] The active and pioneering role thus adopted by the Court can in part be explained by the wide mandate bestowed upon it by the Treaties. As previously mentioned, the fundamental provision in this regard is the first paragraph of Article 19(1) TEU:

> 'The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. *It shall ensure that in the interpretation and application of the Treaties the law is observed*.'[131]

The second sentence is of cardinal importance, since it establishes the Court as the main interpreter and the final arbiter on all matters related to EU law, both concerning the Member States and the Union's own institutions. This provision has, notably, remained unchanged throughout the evolution of the Treaties; the same wording can be found in the corresponding articles in the 1958 EEC Treaty and the 1997 EC Treaty.[132] Moreover,

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[130] For a broader overview, see Tridimas (2018), *supra* note 54, p. 581-583.
[131] First paragraph of Article 19(1) TEU (emphasis added).
[132] See Article 164 EEC Treaty and Article 220 EC Treaty.

the broad task of 'ensuring observance with the law' has been specifically used by the Court over the years to extend its scope of judicial review within the Union. For example, in the abovementioned case *Les Verts*, the Court particularly relied on the provision when it reviewed an act of the European Parliament challenged by a third party, although such a challenge was not permitted by the Treaty.[133] This approach is discernible in numerous other cases, where the Court has drawn upon its wide mandate in Article 19(1) TEU to review measures which were not explicitly under its purview according to the Treaties.[134]

The general mandate of the Court of Justice set out in Article 19(1) has therefore been applied broadly and forms the basis of the Court's active role within the Union. Nevertheless, like all Union institutions the Court is ultimately bound by the principle of conferral of competences established in Articles 4 and 5 TEU. The Court may therefore only act within the limits of the powers assigned to it by the Member States, as expressly stated in Article 13(2) TEU. The broad mandate bestowed upon the Court is thus not limitless but must be exercised in accordance with the Treaties.[135] This entails, *inter alia*, that the powers of the Court must be applied within the frame of the specific judicial procedures outlined in Article 19(3) TEU.[136] The most central of these procedures, especially in relation to the national courts, is the preliminary ruling procedure, which will therefore be examined in greater detail.

4.3.2 Preliminary Ruling Procedure

The preliminary ruling mechanism set out in Article 267 TFEU establishes a procedure of judicial dialogue between the Court of Justice and the national courts. It is thus widely regarded as the keystone of the Union's decentralised justice system, as it enables the Court to guide the national courts in their application of EU law through a centralised interpretation.[137] The main purpose of the procedure is thereby to ensure a correct and uniform application of EU law across the Union and to facilitate cooperation between the

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[133] Case 294/83 *Les Verts v Parliament* [1986] EU:C:1986:166, para. 25.
[134] See e.g. Case 22/70 *Commission v Council (ERTA)* [1971] EU:C:1971:32, para. 40-41; Case C-70/88 *Parliament v Council* [1990] EU:C:1990:217, para. 23.
[135] Case C-73/14 *Council of the European Union v Commission* [2015] EU:C:2015:663, para. 61.
[136] Ibid. See also R. Schütze (2018), *European Union Law*, pp. 212-213.
[137] See Case 283/81 *CILFIT* [1982] EU:C:1982:335, para. 7; and more recently Case C-160/14 *Ferreira da Silva and Others* [2015] EU:C:2015:265, para. 37; Case C-614/14 *Atanas and Others* [2016] EU:C:2016:514, para. 15.

Court and the national courts.[138] The practical significance of the procedure is therefore immense, which is accentuated by the fact that preliminary rulings account for approximately 70 percent of the judgments delivered by the Court.[139]

According to Article 267 TFEU, the Court of Justice has jurisdiction to give preliminary rulings on the interpretation of the Treaties, as well as the interpretation *and* validity of other acts of Union law. Importantly, the Court thus only rules on the interpretation and/or validity of the EU law in question; the concrete application of the law to the facts of the case is in principle left to the national courts. A reference for a preliminary ruling can be made by any court of tribunal of a Member States, when it is 'necessary' to enable them to give judgment in a pending case.[140] The question of EU law thereby has to be relevant and connected to the concrete case at hand, which excludes references of purely hypothetical questions.[141] Notably, the power of national courts to make references to the Court of Justice turns into an *obligation* if the court in question is that of last resort, as stipulated by the third paragraph of Article 267. That is, if a national court whose decisions cannot be subject to further appeal encounters a question of EU law, an answer to which is necessary to give judgment, it *must* refer the question to the Court.

The scope of this obligation has been further clarified by the Court of Justice through the creation of two main exceptions. Firstly, the Court established in *Da Costa* that national courts of last instance may refrain from submitting preliminary questions if a materially identical question has already been answered by the Court in a previous ruling.[142] This is known as *acte éclairé* and has subsequently been widened to mean that if the Court has already dealt with the same 'point of law' the obligation to request a preliminary ruling can be waivered.[143] Secondly, the Court established in *CILFIT* that if the correct application of EU law is 'so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved', there is similarly no obligation

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[138] Opinion 2/13 of the Court of Justice, *Accession of the European Union to the ECHR* [2014] EU:C:2014:2454, para. 176.
[139] See Court of Justice of the European Union, *Annual report 2019 – Judicial Activity*, February 2020, p. 165.
[140] The term 'court of tribunal' will be examined below, see further section 4.4.1.
[141] See further Case C-76/15 *Vervloet and Others* [2016] EU:C:2016:975, para. 57; Case C-510/19 *AZ* [2020] EU:C:2020:953, para. 26.
[142] Joined Cases 28-30/62 *Da Costa* [1963] EU:C:1963:6, p. 38.
[143] Case 283/81 *CILFIT* [1982] EU:C:1982:335, para. 14.

to refer the question.[144] This exception is known as *acte clair* and must meet a number of strict conditions to be applied, so as to ensure that it is not abused by the national courts.[145]

In other words, the obligation on national courts of last resort to refer relevant questions to the Court of Justice may essentially be set aside only in cases where there is little room for interpretation to begin with. Conversely, in all cases where there *is* any relevant doubt regarding the EU law at hand, the third paragraph ensures that the interpretation is ultimately done on a centralised level by the Court of Justice. In this respect, the design of Article 267 TFEU, and in particular the third paragraph, solidifies and facilitates the Court's role as the ultimate interpreter on all issues connected to EU law. It also indicates the role played by the national courts, who are nevertheless responsible for the material application of the law to the case at hand.

As can be drawn from the above, the preliminary ruling procedure builds upon mutual cooperation between the Court of Justice and the national courts, reflecting the different roles assigned to them. In the words of the Court, the procedure is thereby 'essential for the preservation of the Community character of the law established by the Treaties'.[146] Put differently, the entire operation of the internal market would be severely hampered without preliminary rulings, as there would be no guaranteeing that EU law had the same effect in all Member States.[147] The mechanism is therefore arguably one of the most important procedures through which the Court exercises its role as main interpreter of EU law, and its significance is hard to overstate.

4.4 Decentralised Application: The Courts of the Member States

4.4.1 What Constitutes a 'Court or Tribunal' under EU Law?

The term 'court of tribunal' is referred to in Article 267 TFEU to delimitate which national bodies are entitled to make references for preliminary rulings to the Court of

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[144] Ibid. para. 16.
[145] Ibid. paras. 17-20. See also Court of Justice of the European Union, *Application of the CILFIT case-law by national courts or tribunals against whose decisions there is no judicial remedy under national law*, Research note, May 2019, paras. 1-7.
[146] Opinion 1/09 of the Court of Justice, *Draft Agreement Creating a Unified Patent Litigation System* [2011] EU:C:2011:123, para. 83.
[147] For a broader discussion, see Lenaerts and Others (2014), *supra* note 70, pp. 48-51.

Justice. However, the Court's case law on the term is not only relevant with regard to Article 267 but can also be used generally to define any notion of 'court or tribunal' referred to in other parts of EU law.[148] As mentioned, the case law on Article 267 is therefore, for instance, also relevant with regard to Article 47 of the Charter.

The Treaties provide no definition of the concept 'court or tribunal', but the Court of Justice has established that the term is to be understood autonomously.[149] This means that the definition is governed by EU law alone, independently from any national understanding of the concept. The Court takes a number of cumulative factors into account when determining whether a body can be considered a court or tribunal. As summarised in the case *Margarit Panicello*, these factors include:

> '[W]ether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.'[150]

These aspects are part of settled case law developed by the Court, although some criteria have been more elaborated upon than others.[151] For a body to be permanently established by law it needs to exercise its judicial function based on a legislative act and not only on an occasional basis, which for example normally excludes arbitral bodies.[152] Furthermore, the Court has held that a body's jurisdiction is to be considered compulsory when it is provided for by law and not optional.[153] Regarding the *inter partes* requirement, which essentially means that the scope of the proceeding is determined by the parties, the Court has held that it is not an absolute criterion. For example, it has accepted that bodies with inquisitorial powers may still constitute courts, even though such bodies adjudicate on matters not raised by the parties.[154] The criterion that rules of law must be applied requires the body to apply legally binding rules, as opposed to principles of fairness.[155]

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[148] Aalto and Others (2014), *supra* note 95, p. 1251.
[149] Case C-54/96 *Dorsch Consult* [1997] EU:C:1997:413, para. 23.
[150] Case C-503/15 *Margarit Panicello* [2017] EU:C:2017:126, para. 27.
[151] See Case C-53/03 *Syfait and Others* [2005] EU:C:2005:333, para. 29 and the case law cited.
[152] Cf. Opinion of AG Tesauro in Case C-54/96 *Dorsch Consult* [1997] EU:C:1997:413, para. 28.
[153] Case C-246/05 *Armin Häupl* [2007] EU:C:2007:340, para. 19.
[154] Joines Cases C-110/98-C-147/98 *Gabalfrisa* [2000] EU:C:2000:145, para. 37.
[155] Ibid. para. 38.

The final criterion of judicial independence is often decisive and, as previously examined, requires the body to enjoy both external and internal independence.[156] By way of illustration, the Court ruled in *Wilson* that a national body tasked with handling certain matters related to professional lawyers did not satisfy the requirement of internal independence.[157] The body was composed exclusively of other lawyers and the Court therefore held that there could be conflicting interests between the body itself and the parties before it.[158] It could thus not be considered a court or tribunal and would also not have been capable of making references for preliminary rulings.

Hence, it is important to underscore that the criterion of judicial independence fulfils multiple functions within the EU legal order. Firstly, it is an essential part of the individual's right to an effective remedy, as stipulated by Article 47 of the Charter, and it thus operates in the sphere of fundamental rights. Secondly, it is also an imperative aspect in determining whether a national body can make references for preliminary rulings, which shows that the criterion also performs a structural function within the Union's justice system. Thirdly, it may also be recalled that the criterion is a key part of the rule of law, meaning that it is connected to one of the Union's foundational values. Evidently, judicial independence is therefore of cardinal importance within the EU legal framework.

4.4.2 National Courts as Enforcers of EU Law

As can be drawn from the sections above, the courts of the Member States play a leading role in ensuring the effectiveness of EU law on the national levels. As noted, this is partly a result of the combined effect of the principles of supremacy, direct effect and consistent interpretation. By virtue of those principles, the national courts are *required* to directly apply EU law when it has direct effect, set aside national law in all cases of conflict and, as far as possible, give domestic provisions an interpretation which is in accordance with Union law. Considered together, the principles thereby entail that national courts must also be understood as 'European courts', in that they carry out and are responsible for the principal application of EU law. Stated differently, the principles can be seen as an

[156] See further section 3.4.4.
[157] C-506/04 *Wilson* [2006] EU:C:2006:587, para. 58-62.
[158] Ibid. para. 57.

expression of how the Court of Justice has 'recruited' the national courts to key positions within the Union's justice system.[159]

Another central aspect of the national courts' role as enforcers of EU law is the fact that virtually all cases concerning natural or legal persons (i.e. most cases) can only be dealt with before the domestic judiciaries.[160] This follows from the clear division of duties established by the Treaties, where the main responsibility for safeguarding the interests of individual parties lies with the Member States. As discussed, the second subparagraph of Article 19(1) TEU is an expression of this division, since it emphasises the *duty of the Member States* to ensure the judicial protection of individuals.[161] More specifically, it also follows from the limited *locus standi* of individual parties before the Court of Justice. Pursuant to Article 263(4) TFEU, and a restrictive case law developed by the Court, individual parties have extremely limited possibilities to litigate directly on EU level.[162] Instead, as repeatedly stressed by the Court, such parties are generally referred to bring their cases before the national courts, who may in turn ask for a preliminary ruling if questions of EU law are at stake.[163]

Consequently, the direct enforcement and protection of the various rights conferred on individuals by EU law is primarily carried out by the courts of the Member States, which further underlines their role as 'European courts'. The Court of Justice, on the other hand, offers mostly *indirect* judicial protection for individuals by responding to requests for preliminary rulings sent by those courts. It is therefore imperative that the national courts refer such requests in all relevant cases, as it is the only way for most individuals to have their cases tried in the Court of Justice. The preliminary ruling procedure is thus important not only to ensure a uniform application of EU law but also so that individuals can have a possibility to access, albeit indirectly, the Court of Justice.

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[159] S. Prechal (2006), 'National Courts in the EU Judicial Structures' in: *Yearbook of European Law*, vol. 25:1, pp. 429-430.
[160] Cf. C. Lacchi (2016), 'Multilevel Judicial Protection in the EU and Preliminary References' in: *Common Market Law Review*, vol. 53, pp. 687-688.
[161] See further Opinion 1/09 of the Court of Justice, *Draft Agreement Creating a Unified Patent Litigation System* [2011] EU:C:2011:123, para. 66.
[162] See e.g. Case 25/62 *Plaumann* [1963] EU:C:1963:17, p. 107; and more recently Case C-583/11 P *Inuit Tapiriit Kanatami* [2013] EU:C:2013:625, paras. 71-72; Joined Cases C-408/15 P and C-409/15 P *Ackermann and Others* [2016] EU:C:2016893; paras. 49-52.
[163] Case C-50/00 P *UPA v Council* [2002] EU:C:2002:462, para. 40; Case C-274/12 P *Telefónica* [2013] EU:C:2013:852, para. 59.

In more general terms, the decentralised application of EU law outlined above is a reflection of the principle of subsidiarity, established in Article 5 TEU. As stated in the Preamble of the TEU, one of the central aspects of the principle is that decisions should be taken 'as closely as possible to the citizens.' By empowering and obliging the national court to be the practical enforcers of EU law in most cases, the Union's judicial architecture facilitates that the majority of judgments are taken on a level closer to the parties of the case. Furthermore, there is also practical dimension, namely that it allows the EU to make use of the existing judicial structures in the Member States.

4.4.3 National Procedural Autonomy

As previously mentioned, Member States are generally free to apply their own procedural rules and remedies in procedures concerning EU law before national courts, unless the Union has regulated otherwise. This follows from the principle of national procedural autonomy, as articulated in *Rewe*. In general, the principle reflects the fact that the more precise means through which rights can be enforced, i.e. the design of procedural rules, are often embedded in national convictions on fairness and justice.[164] In this regard, procedural autonomy can be seen as an expression of Article 4(2) TEU, which states that the Union must respect the national identities of the Member States.

Nevertheless, national procedural autonomy has never been wholly absolute. Rather, as discussed, it is subject to various limitations, most notably through the principles of effectiveness, equivalence and effective judicial protection. In addition, the principle of national procedural autonomy has also notably been *increasingly* limited over the years.[165] For example, the Union legislator has enacted more secondary law imposing procedural standards on Member States, which has consequently limited the procedural autonomy in different areas.[166] In addition, fundamental rights have also gained an important role in placing standards on the design of procedural rules. In sum, it is therefore important to underscore that national procedural autonomy is in practice a restricted principle, which, as it would appear, has been losing ground over time.

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[164] A. Arnull (2018), 'Remedies Before National Courts' in: *Oxford Principles of European Union Law*, R. Schütze & T. Tridimas (eds.), p. 1013.
[165] Prechal (2015), *supra* note 66, p. 65.
[166] For an overview, see R. Widdershoven (2019), 'National Procedural Autonomy and General EU Law Limits' in: *Review of European Administrative Law*, Vol. 12, pp. 5-6.

4.5 Analysis: Central Features of the Union's Judiciary

The present chapter has illustrated a number of central features in the EU's judicial architecture, which essentially builds upon centralised interpretation and decentralised application of Union law. To begin with, one of the most notable aspects of the system's development is the fact that the Court of Justice early on empowered the national courts to be the main enforcers of EU law on the domestic levels. This is evidenced by the design of the principles of supremacy, direct effect and consistent interpretation, and is reflected in the fact that the Treaties have clearly given the Member States the primary responsibility for safeguarding the interests of individuals. The contribution of national courts as 'European courts' is therefore indispensable for the functioning of EU law.

Furthermore, a key feature of the Union's judicial architecture is the central function of the Court of Justice, whose wide mandate to interpret EU law has enabled it to take on a pivotal role in shaping the Union legal order. Notably, the Court's relationship with the national courts is essentially defined by the preliminary ruling mechanism and the system of judicial cooperation established by it. By enabling, and ultimately obliging, the national courts to make references to the Court of Justice, the mechanism both reinforces the Court's role as central interpreter and fulfils other crucial functions, such as ensuring a uniform application of EU law. In this regard, it is essential to underline that the preliminary ruling system, in turn, relies upon the existence of properly functioning national courts, which, *inter alia,* requires judicial independence under EU law.

In sum, it can be concluded that the Union's judicial architecture is fundamentally centred around the cooperation between the Court of Justice and the national courts. Therefore, as noted by Tridimas, 'no other institutional relationship in EU law is as important as that between the [Court of Justice] and the national courts'.[167] In addition, it can be concluded that the Union's justice system entails that the effectiveness of EU law is, in practice, almost completely dependent upon the national courts and procedures. In light of this, it is not surprising that Union law has increasingly placed common standards on national procedural rules, since the EU legal system essentially relies on the quality of the domestic procedures and judiciaries.

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[167] Tridimas (2018), *supra* note 54, p. 584.

5 Recent Application of Article 19(1) TEU

5.1 Introduction

In this chapter, the recent case law development concerning the second subparagraph of Article 19(1) and the rule of law will be presented and analysed. The analysis will be done on a case-by-case basis and include relevant aspects of the opinions of the Advocate Generals and the judgments from the Court of Justice. Notably, the examination will focus solely on aspects that are relevant in relation to the research questions. The combined conclusions that can be drawn from the cases will be presented in Chapter 6.

5.2 Portuguese Judges

5.2.1 Background

The origin of the *Portuguese Judges* case was an act of legislation in Portugal that reduced the renumeration of a series of office holders working in the public administration, including judges at the Portuguese Court of Auditors.[168] The salary reduction was adopted within the framework of EU austerity measures, which in essence required Portugal to reduce its excessive budget deficit. However, the Portuguese judges' trade union challenged the legality of the legislation, alleging that it infringed the principle of judicial independence enshrined in the second subparagraph of Article 19(1) TEU and Article 47 of the Charter. The Portuguese court sent a request for a preliminary ruling to the Court of Justice, asking whether the principle of judicial independence contained in those provisions, and the case law of the Court, precluded the salary reduction, considering that it was implemented to comply with EU requirements.[169]

5.2.2 Opinion of the Advocate General

The Advocate General firstly noted that the scope of application of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter are different.[170] To determine whether the second subparagraph is applicable to national judges, one needs to

[168] Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] EU:C:2018:117.
[169] Ibid. paras. 11-18.
[170] Opinion of AG Saugmangaard Øe in Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] EU:C:2018:117, para. 36.

assess whether the judges are 'likely to exercise their judicial activity in areas covered by EU law, and therefore to act as European judges.'[171] According to the Advocate General, this was the case regarding the Portuguese judges. The scope of Article 47 of the Charter, on the other hand, is determined based on whether the measure in question implements specific EU provisions, in line with Article 51(1) of the Charter. The Advocate General found support for this in a Council decision and thus held that both Article 19(1) and Article 47 were applicable to the case.[172]

As regards the substance of Article 19(1), the Advocate General found that the concept of effective judicial protection contained therein does *not* include the principle of judicial independence and emphasised that the two should not be confused.[173] This conclusion was based on the argument that Article 19(1) 'is not aimed directly at the national judges, but is intended to ensure that possibilities of remedies exist in the Member States.'[174] According to the Advocate General, Article 19(1) thus obliges Member States to lay down sufficient procedural rules and mechanisms to settle EU law disputes but it does not deal with the independence of the judges.[175] On the contrary, Article 47 of the Charter explicitly comprises judicial independence and the Advocate General therefore held that the assessment should be based on that provision. He subsequently concluded that the salary reduction was not contrary to EU law or judicial independence.[176]

5.2.3 Judgement of the Court

The Court of Justice reframed the question sent by the Portuguese court to solely concern the second subparagraph of Article 19(1) TEU, thereby excluding the question of whether Article 47 of the Charter was applicable or not. In its first line of reasoning, the Court pointed out that the material scope of Article 19(1) relates to 'fields covered by Union law', irrespective of whether Member States are implementing EU law within the meaning of Article 51(1) of the Charter.[177] In other words, the Court emphasised that the field of application of the two provisions is different. Thereafter the Court recalled that

[171] Ibid. para. 41.
[172] Ibid. paras. 43 and 52.
[173] Ibid. paras. 62-64 and 67.
[174] Ibid. para. 61.
[175] Ibid. paras. 61-67.
[176] Ibid. para. 78-81.
[177] Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] EU:C:2018:117, para. 29.

the Union is founded on the rule of law, as stipulated by Article 2 TEU, and noted that the mutual trust between the Member States is contingent upon that value. The Court subsequently held:

> 'Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals'[178]

The Court then emphasised that Article 4(3) TEU and Article 19(1) TEU requires Member States to ensure effective judicial protection in the fields covered by EU law, by establishing procedures and remedies that guarantee effective judicial review.[179] After recalling that effective judicial protection is a general constitutional principle of EU law, the Court reiterated that judicial review is the 'essence of the rule of law', as previously stated in the case *Rosneft*.[180] The Court continued:

> 'It follows that every Member State must ensure that the bodies which, as "courts or tribunals" within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection.'[181]

Subsequently, the Court noted that the question of whether the Portuguese Court of Auditors qualifies as a 'court or tribunal' under EU law is for the referring court to assess. However, after emphasising that the Court of Auditors *may* have to rule on questions concerning the application and interpretation of EU law, the Court announced:

> 'Consequently, to the extent that the [Portuguese Court of Auditors] *may rule* […] *on questions concerning the application or interpretation of EU law*, which it is for the referring court to verify, the Member State concerned *must* ensure that that court meets the requirement essential to effective judicial protection, in accordance with the second subparagraph of Article 19(1) TEU.'[182]

That is, if the referring court confirms that the Court of Auditors *may* have to rule on matters concerning EU law, it has to meet the requirements of effective judicial protection. As regards these requirements, the Court held that judicial independence is

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[178] Ibid. para. 32.
[179] Ibid. para 34.
[180] Ibid. para 36. See Case C-72/15 *Rosneft* [2017] EU:C:2017:236.
[181] Ibid. para. 37.
[182] Ibid. para. 40 (emphasis added).

essential for effective judicial protection, adding that this is 'confirmed' by Article 47 of the Charter.[183] The Court further emphasised that such independence is crucial for the proper working of the preliminary rulings mechanism in Article 267 TFEU and that it is thus required on the levels of the Member States.

The Court then applied Article 19(1) TEU, containing the principle of judicial independence, to the facts of the case. In conclusion, it held that the salary reduction did not infringe judicial independence in Article 19(1), as the measures were temporary, of a general nature and were adopted to meet mandatory EU requirements.[184]

5.2.4 Analysis of the Case

In *Portuguese Judges*, the Court of Justice began by rephrasing the case to solely concern the second subparagraph of Article 19(1) TEU. It did therefore not consider whether the Charter was applicable but instead emphasised that the material scope of Article 19(1) is different. The provision applies to 'fields covered by EU law', which the Court held to be distinct from whether the Member State is 'implementing Union law' pursuant to Article 51(1) of the Charter. In this regard, it is worth reiterating the Court's previous ruling in *Åkerberg Fransson*, where it held that the scope of the Charter follows the scope of EU law; situations covered by EU law are also covered by the Charter.[185] However, in *Portuguese Judges* the Court appears to imply that there is, in fact, a sphere in between, namely situations that belong to 'fields covered by EU law' without being encompassed by the notion of 'implementing Union law'.

The Court thereby seems to indicate that it did not *need* to assess whether the Portuguese austerity measures rendered the Charter applicable, since Article 19(1) has a broader scope and was applicable anyway. According to the Court, the mere fact that the Portuguese Court of Auditors could *potentially* rule on matters concerning Union law was sufficient to bring it within 'fields covered by EU law', making the second subparagraph of Article 19(1) applicable. More generally, this implies that any national court that could, theoretically, come to rule on the application or interpretation of EU law is automatically

[183] Ibid. para. 41.
[184] Ibid. paras. 46-52.
[185] See further section 3.4.1.

subject to Article 19(1). This clearly creates a vast scope of application, since in practice virtually every national court may be called upon to rule on matters concerning EU law.[186]

As regards the substance of Article 19(1), the Court notably held that the provision gives concrete expression to the rule of law in Article 2 TEU by entrusting the key function of judicial review to the national courts. The Court thereby concluded that Article 19(1) contains a substantive *obligation* for Member States to ensure that the courts live up to the requirements of effective judicial protection, including the principle of judicial independence. The latter conclusion is in sharp contrast with the Advocate General, who argued that the two concepts are entirely separate, and that Article 19(1) cannot be interpreted to comprise judicial independence. It is also notable that the Court used Article 47 of the Charter as an interpretative tool to confirm its conclusion in this respect, despite the fact that the applicability of the Charter was never assessed. This is remarkable, as the Court thereby indirectly bypassed the threshold created by Article 51(1) of the Charter.

Nevertheless, the Court clarified that judicial independence is an essential part of the concept of effective judicial protection and, consequently, follows as a requirement from the second subparagraph of Article 19(1). In sum, the construction developed by the Court in *Portuguese Judges* thus entails that all national courts that may potentially be called on to interpret and apply EU law must enjoy judicial independence, which the Member State is obliged to guarantee under Article 19(1). As noted, it would be difficult to find a national court that could never, potentially, be called upon to rule on matters concerning EU law. In practice, *Portuguese Judges* thereby entails that virtually *all* national courts are within 'fields covered by EU law' according to Article 19(1), which consequently means that they must enjoy judicial independence pursuant to the Court's interpretation.

[186] See further section 4.4.2.

5.3 Commission v Poland (*Independence of the Supreme Court*)

5.3.1 Background

In 2018, the Commission launched infringement proceedings against Poland under Article 258 TFEU, alleging that the state had failed to fulfil its obligations under the combined provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter.[187] Two grounds were invoked by the Commission. Firstly, that a new law lowering the retirement age of judges in the Supreme Court, which effectively forced one third into retirement, infringed the principle of the irremovability of judges. Secondly, that the same law also infringed the principle of judicial independence by granting the Polish President discretion to extend the judges' mandate beyond the newly fixed retirement age. The Court of Justice had previously granted interim measures in the case and, as a result, Poland had already repealed the contested law at the time of the proceedings.[188]

5.3.2 Opinion of the Advocate General

The Advocate General firstly dismissed Poland's argument that the case was inadmissible since the law had already been repealed, emphasising that this did not remove the need for the Court to deliver a ruling on the issue.[189] As regards the scope of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, the Advocate General held that the two provisions must be assessed separately and not in combination.[190] He referred to *Portuguese Judges* and interpreted that the Court had based its actual judgment on Article 19(1) TEU, as an autonomous provision, and used Article 47 merely to confirm the findings.[191] According to the Advocate General, a combined application of the two provisions, without an assessment under Article 51(1) of the Charter, could therefore not be deduced from the case. He then notably added, and emphasised, that any contrary finding would diminish the limits of the Charter.[192]

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[187] Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* [2019] EU:C:2019:325 (hereinafter: *Commission v Poland*).
[188] Ibid. paras. 15-26.
[189] Opinion of AG Tanchev in Case C-619/18 *Commission v Poland* [2019] EU:C:2019:325, para. 47.
[190] Ibid. para. 54.
[191] Ibid. paras. 55-56.
[192] Ibid. para. 57.

In applying the two provision separately, the Advocate General subsequently concluded that Article 47 was inapplicable, because the Polish law in question did not implement EU law within the meaning of Article 51(1) of the Charter.[193] Instead, he held that the second subparagraph of Article 19(1) TEU was applicable to case. This was based on the fact that the Polish Supreme Court could evidently be called upon to rule on the interpretation and application of EU law, bringing it within 'fields covered by EU law'.[194]

Concerning the lowering of the retirement age, the Advocate General recalled that judges' protection against removal from office is an essential part of judicial independence and is thus protected by Article 19(1).[195] He furthermore emphasised that the measure in question was different from those at stake in *Portuguese Judges*, as the lowering of the retirement age specifically targeted the judiciary, was not temporary and had a considerable impact on the composition of the Supreme Court.[196] Moreover, the Advocate General found that the Polish President's discretion to extend the judges' mandate jeopardised the Supreme Court's external independence, by making it liable to pressure from the President.[197] The Advocate General therefore concluded that both measures violated the second subparagraph of Article 19(1) TEU.

5.3.3 Judgment of the Court

The Court of Justice began by recalling that pursuant to Article 49 TEU, the EU consists of states which have voluntarily committed themselves to a set of shared values, enshrined in Article 2 TEU.[198] The Court emphasised that these values include the rule of law and are the basis for the mutual trust between Member States. Thereafter, the Court highlighted that the Union's judicial system is intended to ensure consistency and uniformity in the interpretation of EU law and that the preliminary ruling procedure in Article 267 TFEU functions as the keystone of this system.[199]

Next, the Court reiterated its previous conclusions from *Portuguese Judges* concerning the second subparagraph of Article 19(1) TEU. It emphasised that the provision gives

[193] Ibid. para. 67.
[194] Ibid. para. 63.
[195] Ibid. paras. 70-71.
[196] Ibid. paras. 74-75.
[197] Ibid. para. 89.
[198] Case C-619/18 *Commission v Poland* [2019] EU:C:2019:325, paras. 31, 42.
[199] Ibid. paras. 43-45.

concrete expression to the rule of law and entrusts the Member States with the responsibility of ensuring effective judicial protection of individuals.[200] The Court then recalled that the material scope of Article 19(1) refers to 'fields covered by EU law', regardless of whether the Charter is applicable, and continued:

> 'Contrary to what has been claimed by the Republic of Poland and Hungary in this respect, the fact that the national salary reduction measures at issue in [*Portuguese Judges*] were adopted due to requirements linked to the elimination of the excessive budget deficit of the Member State […] *did not play any role* in the interpretation which led the Court to conclude that the second subparagraph of Article 19(1) TEU was applicable in the case in question.'[201]

The Court thereby clarified that the application of Article 19(1) in *Portuguese Judges* had nothing to do with the fact that the austerity measures in that case were related to EU requirements. Rather, it was solely based on the assessment that the court in question could potentially be called upon to rule on matters concerning EU law. Furthermore, the Court also rejected a second argument brought forward by Poland, namely that the organisation of justice in Member States falls within the competence of those Member States and not the Union. The Court principally agreed that such questions were within the competences of the Member States, however:

> '[T]he fact remains that, when exercising that competence, Member States are required to comply with their obligations deriving from EU law […] and, in particular, from the second subparagraph of Article 19(1) TEU.'[202]

Subsequently, the Court added that it follows from the foregoing that Article 19(1) TEU requires Member States to ensure effective judicial protection, 'within the meaning in particular of Article 47 of the Charter'.[203] The Court then noted that since the Polish Supreme Court may be called upon to rule on questions concerning EU law, it must meet the requirements of effective judicial protection pursuant to Article 19(1), including judicial independence.

In assessing the lowering of the retirement age, the Court began by reaffirming its previous case law on judicial independence in relation to Article 19(1). It thus held that

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[200] Ibid. paras. 47-49.
[201] Ibid. para. 51 (emphasis added).
[202] Ibid. para. 52.
[203] Ibid. para. 54.

the provision comprises both external and internal independence, underscoring that the principle of irremovability is an essential part of the former aspect.[204] The Court then observed that exceptions to that principle are allowed only if they are based on legitimate ground, are proportionate and do not raise reasonable doubt as to the imperviousness and neutrality of the court.[205] In the Court's view, the Polish law did not satisfy these criteria. In particular, the Court questioned the true aims of the law, since it targeted a specific group of judges, forced a third of them into immediate retirement and was accompanied by the President's discretion to extend mandates at his will.[206] All considered, the Court concluded that the law was not justified by a legitimate objective.

As regards the President's discretion, the Court held that such mechanisms must be accompanied by substantive conditions and detailed procedural rules in order to ensure the external independence of the court.[207] In this regard, the Court quickly established that the Polish law contained no objective or verifiable criterion governing the President's possibility to adopt decisions.[208] In addition, those decision could not be legally challenged. The Court therefore held that the law did not contain sufficient safeguards to ensure the external independence of the Polish courts. In conclusion, the Court thereby ruled that Poland had failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU on both grounds invoked by the Commission.[209]

5.3.4 Analysis of the Case

In *Commission v Poland*, the Court reaffirms and further develops its precedent on the second subparagraph of Article 19(1) TEU, previously set in *Portuguese Judges*. Notably, the Court solidified the broad scope of the provision by clarifying that the only relevant aspect to consider, with regard to its applicability, is whether the national court or tribunal in question *may* come to rule on issues concerning EU law. The Court could therefore easily conclude that the Polish Supreme Court was subject to Article 19(1) and that Poland was thus obliged to ensure the requirements of effective judicial protection, including judicial independence. It is also interesting to note that the Court expressly

[204] Ibid. paras. 72-75.
[205] Ibid. paras. 76-77.
[206] Ibid. paras. 82-86, 90-91
[207] Ibid. paras. 111-112.
[208] Ibid. para. 114.
[209] Ibid. paras. 123-124.

rejected the argument that the organisation of the domestic justice systems is a purely internal matter for the Member States. The Court thereby appears to underscore that Article 19(1) functions as a limit to the Member States' national procedural autonomy.

Furthermore, the Court deviated from the approach of the Advocate General as regards the need for a separate assessment of the applicability of Article 19(1) TEU and Article 47 of the Charter. As in *Portuguese Judges*, the Court did not address whether the Charter was applicable under Article 51(1) but simply stated that Article 19(1) has a different and broader scope. The Court subsequently based its judgment solely on Article 19(1), while again using Article 47 as an interpretative tool. However, the Court appears to go one step further in *Commission v Poland* by broadly concluding that judicial protection in Article 19(1) must be understood 'within the meaning in particular of Article 47'. This suggests that all the previous case law on Article 47 may have relevance in the application of Article 19(1), not only with regard to judicial independence. Notably, such indirect use of Article 47 appears to go against the Advocate General's warning that the limits of the Charter could be diminished.

Another significant feature of *Commission v Poland* is that the case confirms that the second subparagraph of Article 19(1) can be used as an autonomous basis in an infringement procedure against a Member State. In this regard, one can recall the 2012 case *Commission v Hungary*, which concerned a very similar piece of legislation in Hungary that targeted the judiciary by lowering the retirement age.[210] The Commission, however, based its infringement procedure in the case merely on a directive, which illustrates that there was uncertainty as to whether any Treaty provision or other primary law was applicable to the situation. Through *Commission v Poland* this has been resolved, and it is clear Article 19(1) is an enforceable provision against Member States who attempt to undermine the judicial independence of their courts.

Lastly, *Commission v Poland* also further clarified the substance of Article 19(1) by making clear that the Court's previous case law judicial independence, including the principle of the irremovability of judges, is applicable in full through the provision.

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[210] Case C-286/12 *Commission v Hungary* [2012] EU:C:2012:687.

5.4 A.K. and Others

5.4.1 Background

The joined cases *A.K. and Others* arose as a result of the abovementioned law in Poland lowering the retirement age of Supreme Court judges.[211] A number of the affected judges, who were forced to retire because of the law, brought actions before the Polish Supreme Court, arguing, *inter alia*, that their retirement constituted unlawful age discrimination under Directive 2000/78. However, under the same Polish law such employment matters fell under the exclusive jurisdiction of a newly created Disciplinary Chamber within the Supreme Court, which consisted solely of judges selected by a politically controlled body (the 'KRS'). The other chamber of the Supreme Court, before which the cases had been brought, therefore questioned the judicial independence of the Disciplinary Chamber and decided to request a preliminary ruling from the Court of Justice. In essence, the Supreme Court asked whether the Disciplinary Chamber was an independent court within the meaning of EU law and, if not, whether it could disapply the provision that gave the Chamber jurisdiction. The questions were based, *inter alia*, on Article 19(1) TEU and Article 47 of the Charter.[212]

5.4.2 Opinion of the Advocate General

The Advocate General began by noting that the applicants before the Supreme Court were relying on Directive 2000/78 as the legal basis to their claims of unlawful discrimination. In the Advocate General's view, the case was thereby a textbook example of a situation in which a Member State is 'implementing Union law' under Article 51(1) of the Charter, since the applicants were seeking to enforce EU law before a national court.[213] He therefore held that Article 47 of the Charter was clearly applicable to the case and that the assessment of the Disciplinary Chamber should be based primarily on that provision.[214]

In applying Article 47 of the Charter, the Advocate General firstly noted that the manner in which judges are appointed is a relevant aspect to examine when assessing judicial

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[211] Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others* [2019] EU:C:2019:982.
[212] Ibid. paras. 37-50, 72.
[213] Opinion of AG Tanchev in Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others* [2019] EU:C:2019:982, para 84.
[214] Ibid. para. 85.

independence.[215] He subsequently found that in order to assess the independence of the Disciplinary Chamber, it was necessary to consider whether the body that appointed the judges, namely the KRS, was itself independent.[216] In this regard, the Advocate General observed that the majority of members of the KRS were politically appointed by the legislative and executive authorities, without influence from the judicial community.[217] According to the Advocate General, this compromised the independence of the KRS, which consequently meant that the Disciplinary Chamber also lacked independence.[218]

Despite focusing on Article 47 of the Charter, the Advocate General also briefly assessed the judicial independence of the Disciplinary Chamber under Article 19(1) TEU, subsequently reaching the same conclusion that it was not independent under EU law. Notably, he added that the circumstances surrounding the Chamber amounted to a 'structural and generalised' breach of the essence of independence in Article 19(1).[219] Since the Chamber was thus contrary to both Article 47 of the Charter and Article 19(1) TEU, the Advocate General held that the Supreme Court was obliged to disapply the law that gave the Disciplinary Chamber exclusive jurisdiction.[220]

5.4.3 Judgment of the Court

The Court of Justice began by addressing one of Poland's main objections in the case, namely that the EU has no competence on matters concerning the jurisdictions of national courts. In response, the Court reiterated that although such matters are in principle within the competence of the Member States, they must still comply with their obligations under EU law when exercising it.[221] The Court then assessed whether the case fell under the scope of Article 47 of the Charter. It notably recalled that pursuant to Article 51(1), the Charter is applicable 'in all situations governed by EU law, but not outside those

[215] Ibid. paras. 115-117.
[216] Ibid. para. 129.
[217] Ibid. paras. 132-134.
[218] Ibid. para. 137.
[219] Ibid. para. 152.
[220] Ibid. paras. 155-156.
[221] Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others* [2019] EU:C:2019:982, paras. 73-74.

situations'.[222] The Court observed that the applicants before the Polish Supreme Court were relying on Directive 2000/78 as the legal basis to their claims, which entailed:

> '[T]hat the present cases are situations governed by EU law, so that the applicants in the main proceedings are justified in asserting the right to effective judicial protection afforded to them by Article 47 of the Charter.'[223]

Having thus declared Article 47 of the Charter applicable, the Court reaffirmed that the second subparagraph of Article 19(1) TEU guarantees effective judicial protection 'in fields covered by EU law' regardless of whether the Charter is applicable. Since it was common ground that the Disciplinary Chamber would be called on to rule on matters related to EU law, the Court held that Article 19(1) was also applicable to the case.[224]

With regard to the substance of the referred questions, the Court began by re-emphasising that Article 47 of the Charter was clearly applicable. The Court then noted that subject to Article 52(3) of the Charter, the interpretation of those provisions must at a minimum entail the same level of protection as the ECHR in relation to corresponding rights.[225] After recalling its own case law on judicial independence, the Court accentuated that Article 47 of the Charter 'is borne out by the case law of the [ECtHR]' on Article 6 ECHR.[226] The Court subsequently referred to judgments from the ECtHR to confirm that the mode of appointment of judges, and the objective impartiality of those judges, are crucial aspects to jointly consider in relation to judicial independence.[227] As to the case at hand, the Court began by stressing:

> 'It must be borne in mind that Article 267 TFEU does not empower the Court to apply rules of EU law to a particular case, but only to rule on the interpretation of the Treaties […]'[228]

The Court thereby underscored that it would provide guidance on the interpretation of EU law through the preliminary ruling, but that it was ultimately for the Polish Supreme Court to apply that law in relation to the Disciplinary Chamber. Subsequently, the Court

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[222] Ibid. para. 78.
[223] Ibid. para. 81.
[224] Ibid. pars. 82-84.
[225] Ibid. paras. 116-118.
[226] Ibid. para. 126.
[227] Ibid. paras. 127-130.
[228] Ibid. para. 127.

observed that one of the factors that the Supreme Court could thus take into account when assessing the Disciplinary Chamber, was the independence of the KRS.[229] In this respect, the Court pointed to a number of aspects indicating that the KRS was not independent in relation to the legislative and executive authorities in Poland.[230] Furthermore, the Court also identified various features relating to the Disciplinary Chamber in itself that the Supreme Court could use to assess its independence, e.g. the fact that the body consisted only of newly appointed judges.[231]

Nevertheless, the Court left the concrete assessment and application of the relevant criteria to the Polish Supreme Court. It therefore stopped short of declaring that the Disciplinary Chamber was not an independent court within the meaning of Article 47 of the Charter. Instead, the Court simply held that if the Supreme Court were to conclude that the Disciplinary Chamber lacked sufficient independence, it followed from the principle of the supremacy of EU law that it had to set aside the national provisions which gave the Chamber jurisdiction.[232]

The Court thereby provided guidance on how Article 47 of the Charter was to be interpreted in the case, but it did not decide the final outcome. As regards Article 19(1) TEU, the Court added in one of the final paragraphs of the judgments:

> 'It does not appear necessary to conduct a distinct analysis of Article 2 and the second subparagraph of Article 19(1) TEU, *which can only reinforce the conclusion* already set out above […]'[233]

In other words, the Court considered that the outcome of its interpretation on judicial independence under Article 47 of the Charter would have been the same had it focused on Article 19(1) TEU. Thus, no separate assessment was required. In conclusion, the Court underlined a number of factors that the Supreme Court could take into consideration when assessing the Disciplinary Chamber under Article 47, notably focused on the 'characteristics and the means by which its members have been appointed'.[234]

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[229] Ibid. para. 138.
[230] Ibid. para. 143.
[231] Ibid. para. 150.
[232] Ibid. para. 166.
[233] Ibid. para. 169 (emphasis added).
[234] Ibid. para. 171.

5.4.4 Analysis of the Case

In *A.K. and Others*, the Court of Justice appears to adopt a different approach in its reasoning compared to the previously examined cases. The Court based its assessment of judicial independence almost exclusively on Article 47 of the Charter after finding that the provision was properly applicable under Article 51(1). The second subparagraph of Article 19(1) TEU, on the other hand, was declared applicable but merely included in the end without being used in and of itself. Part of the explanation for this is likely the fact that an EU directive clearly formed part of the basis of the proceedings in the case. As the Advocate General explained, this made the circumstances a textbook example of a situation in which the Charter is applicable under Article 51(1).

By comparison, there was no similar piece of secondary law, which unmistakably rendered the Charter applicable, in the previous cases. In *A.K. and Others* it was thus easier for the Court to conclude that the Charter was applicable in a straightforward manner, which could explain the primary use of Article 47 thereof. However, despite focusing on Article 47, the Court's ruling in the case still offers important indications with regard to the second subparagraph of Article 19(1) TEU. To begin with, it is notable that the Court reaffirmed the vast scope of the provision by declaring it applicable on the Disciplinary Chamber, since that body could potentially rule on issues related to EU law. Furthermore, the Court's statement that an analysis of Article 19(1) would only reinforce the conclusions drawn under Article 47 of the Charter clearly implies that the substantive content of the two provisions is the same. The Court did thus not alter its previous findings as regards the scope and substance of Article 19(1). Rather, it underscored that a separate analysis of both provisions is not always necessary.

In addition, *A.K. and Others* appears to shed new light on the usage of Article 47 of the Charter in relation to Article 19(1) TEU. Specifically, the judgment indicates that in cases where an assessment under Article 51(1) shows that the Charter is applicable, Article 47 operates as a *lex specialis* with regard to Article 19(1) TEU. This is supported both by the manner in which the Court used the two provisions in the case, as well as the general fact that Article 47 is a much more detailed legal provision compared to Article 19(1) TEU. The Court therefore appears to have clarified that the assessment of judicial independence should firstly be done based on Article 47, if the case falls within the narrower scope of the Charter.

More generally, another notable feature of *A.K. and Others* is that the Court adopted a more cautious approach in its conclusions than suggested by the Advocate General. While the latter firmly held that the Disciplinary Chamber constituted a 'structural and generalised' *breach* of judicial independence in Article 19(1), the Court never directly declared the Chamber as incompatible with EU law. Instead, it identified relevant aspects and emphasised that it was for the Polish Supreme Court to carry out the final assessment. The Court thereby underlined that its task when delivering preliminary rulings is to *interpret* the law in order to guide the national courts – not to establish infringements of EU law per se. In this regard, and in particular in comparison with the position of the Advocate General, the Court seems to have exercised a degree of self-restraint.

6 Analysis and Conclusions

6.1 Introduction

In this chapter, the combined conclusions from *Portuguese Judges*, *Commission v Poland* and *A.K. and Others* with regard to the second subparagraph of Article 19(1) TEU will be drawn. This will then be used in combination with the findings of the previous chapters to answer the two primary research questions of the thesis. Finally, the general conclusions of the thesis are presented, and an outlook is given on what might lie ahead for the judicial enforcement of the rule of law in the EU.

6.2 The Scope and Substance of Article 19(1) TEU

Through the rulings analysed in the previous chapter, the Court of Justice has displayed its substantive interpretation of the second subparagraph of Article 19(1) TEU, shedding light both on the provision's scope of application and its legal effects. In the first place, it is notable that these judgments are part of the first line of case law to explicitly deal with the practical interpretation of the second subparagraph. As observed by von Danwitz – one of the judges at the Court of Justice – the interpretation set out in *Portuguese Judges* was the first ever substantive interpretation of the provision in Union law history.[235]

Concerning the Court of Justice's interpretation, it can firstly be concluded that the second subparagraph of Article 19(1) TEU has an *immense* material field of application in relation to the national judiciaries. As repeatedly underlined by the Court in the studied cases, any national court or tribunal that *may* come to rule on the interpretation and application of EU law, is automatically within 'fields covered by EU law' and thereby subject to Article 19(1). The 'may' formulation entails that the applicability of the provision is essentially based on a hypothetical assessment. As illustrated by the Court's reasoning in the cases, it suffices to determine that the national court in question could *potentially* rule on issues related to EU law for the provision to be applicable. Conversely, it is not necessary to demonstrate that the national court is actually applying EU law, or that the general case at issue concerns some form of underlying piece of Union legislation.

[235] T. von Danwitz (2018), 'Values and the rule of law: Foundations of the European Union – an inside perspective from the ECJ', *Transcript of lecture held at King's College London*, p. 10.

Importantly, this vast scope of application implies that the only situation in which a national court or tribunal is *not* covered by the second subparagraph of Article 19(1) TEU, is if it has no possibilities at all to interpret and apply any form of EU law. This is in practice a very limited room for exception, since national courts are generally *required* to be the principal enforcers of EU law. In addition, the increasingly intertwined relationship between national law and Union law means that most courts, if not all, will inevitably be faced with questions concerning either EU law in itself or domestic law derived thereof. As mentioned, the Court of Justice's interpretation of Article 19(1) TEU therefore leads to the conclusion that essentially *all* national courts are 'within fields covered by EU law' and thus under the material scope of the second subparagraph.

Besides the vast material field of application, the case law analysis also shows that the Court of Justice has bestowed the second subparagraph of Article 19(1) TEU with significant legal effects. Most notably, it can be concluded that the provision, if applicable, imposes a legal obligation on Member States to ensure the judicial independence of their courts and tribunals. All the previous case law on judicial independence is thereby applicable in full through the second subparagraph, which can thus function as an autonomous provision for assessing the independence of national courts. Moreover, if the obligation to respect that independence is breached, it is also clear that the second subparagraph can be used as the legal basis in an infringement proceeding against the Member State in question, as evidenced by *Commission v Poland*.

In this regard, it can be noted that although the studied cases have mainly concerned judicial independence, a closer examination of the language used by the Court suggests that the legal effects under Article 19(1) TEU could potentially be even more extensive. As repeated by the Court in the studied cases, Article 19(1) obliges Member States to ensure that their courts meet 'the requirements of *effective judicial protection*'. The phrasing appears to imply that the obligations under the provision relate to the *entire* concept of effective judicial protection, not only judicial independence. This is important to note, as it may be recalled that effective judicial protection is a wide-ranging concept in EU law, which comprises a number of different components. Thus, if Article 19(1) TEU in fact covers the entire concept of effective judicial protection, the legal obligations arising from the provision are potentially much wider than concerning only judicial independence. In future case law it is therefore possible that the Court could use Article 19(1) to ensure that national courts meet the other requirements of effective judicial

protection, such as the those relating to, for instance, the individual's right to an adequate remedy and a fair proceeding. This, however, remains to be seen.

In summary, it can be concluded that the Court of Justice's interpretation of the second subparagraph of Article 19(1) TEU shows that the provision has two fundamental sides. The first side consists of the provision's vast material field of application, which in essence covers *all* national courts and tribunals. This aspect specifically follows from the Court's broad interpretation of the notion of 'fields covered by EU law'. The second side of Article 19(1) TEU comprises the substantive legal requirement imposed by the provision, which notably includes a duty for Member States to ensure the judicial independence of their courts and tribunals. This feature stems from the Court's conclusion that judicial independence is an essential part of the requirements of effective judicial protection, contained in the second subparagraph. In sum, the combined effect of these two sides is that Article 19(1) TEU establishes a *general and enforceable obligation* on Member States to ensure that their courts meet the requirements of effective judicial protection, in particular judicial independence.

6.3 Has the Court Expanded the Scope of EU Law?

As can be drawn from the above, the Court of Justice's interpretation of the second subparagraph of Article 19(1) TEU entails that the provision has a vast scope of application as well as significant legal implications for the Member States. The interpretation used by the Court thereby forms the basis for answering the first primary research question of the thesis: Has the Court of Justice in fact expanded the scope of EU law through its interpretation of Article 19(1) TEU? In regard to this question, a number of observations can be made.

In the first place, it is clear that the recent case law constitutes an innovative and ground-breaking use of the second subparagraph of Article 19(1) TEU in and of itself. This becomes particularly evident when the recent development is compared with the origins of the provision and in particular its *travaux préparatoires*. As discussed, the second subparagraph was introduced primarily to give formal recognition to the Court's existing case law and to underline the EU's decentralised character. Thus, there was no mention of judicial independence and no indications that substantive legal obligations would arise under the provision. The recent development therefore marks a novel reinterpretation of

the scope and meaning of the second subparagraph of Article 19(1) TEU, which illustrates that the provision has evolved significantly from its original purpose. This new approach towards Article 19(1) is further accentuated by the fact that the provision was previously unused by the Court and, as it would appear, largely overlooked in the legal discourse. Now, however, the second subparagraph of Article 19(1) TEU may provide the legal bedrock for renewed attempts at enforcing the rule of law in EU Member States – a point which we will return to further below.

Another significant feature of the Court of Justice's use of the second subparagraph of Article 19(1) TEU is that the Court appears to have established a new sphere of Union law through its interpretation of 'fields covered by EU law'. This stems from the Court's conclusion that Article 19(1) TEU applies to 'fields covered by EU law', *irrespective* of whether the Member State is 'implementing Union law' within the meaning of the Charter. This is significant, since the scope of the Charter has traditionally been viewed as following the scope of EU law; if a situation is covered by a provision of Union law, the Charter also applies. However, the Court's recent interpretation implies that there are situations covered by EU law without being covered by the Charter. In other words, there is a sphere of Union law where the general scope of that law does not necessarily coincide with the Charter. This is a new construction, and it notably allowed the Court to declare Article 19(1) applicable without having to carry out an assessment of whether the Charter was applicable under Article 51(1) thereof.

Furthermore, the Court of Justice's use of Article 47 of the Charter and its flexible approach towards the limits of the Charter is also notable in itself. As illustrated, the Court used Article 47 of the Charter as an interpretative tool in both *Portuguese Judges* and *Commission v Poland* in relation to Article 19(1) TEU without properly assessing whether the Charter was applicable as such. The Court thereby appears to have essentially disregarded the limited scope of the Charter in order to reinforce its broad interpretation of the second subparagraph of Article 19(1). This is remarkable in itself, but even more so when considering that the Advocate Generals in both *Portuguese Judges* and *Commission v Poland* actively dissuaded the Court from using such an interpretation.

In essence, the Court of Justice's use of Article 47 of the Charter is therefore significant in two regards. Firstly, it appears to diminish the fundamental limits of the Charter established by Article 51(1). In particular, the Court's use of Article 47 in relation to

Article 19(1) TEU implies that Charter provision can be used as interpretative tools even in situations where the Charter is otherwise inapplicable. The case law can thereby be regarded as an indirect expansion of the legal significance of the Charter. Secondly, the development also illustrates that the detailed requirements of judicial independence have essentially been transferred from Article 47 of the Charter to the second subparagraph of Article 19(1) TEU. Considering the vast material scope of the latter, this entails that the reach of the principle of judicial independence has also significantly expanded, as it is no longer confined to the more limited field of the Charter.

So far, it can thus be concluded that the Court of Justice has adopted a novel and innovative approach towards both Article 19(1) TEU and Article 47 of the Charter. However, the most significant *expansion* of EU law as such is the fact that the Court, through its interpretation, has managed to establish jurisdiction over the organisation of the national judiciaries across the Union. This follows from the Court's creative interpretation that the second subparagraph of Article 19(1) TEU imposes a general obligation on Member States to ensure the judicial independence of all their courts and tribunals. Any national measure that affects or threatens to undermine that independence is therefore a matter of EU law – and consequently under the jurisdiction of the Court. Thus, the new interpretation of Article 19(1) TEU provides the procedural basis for the Court to assess measures concerning the national judiciaries.

This development constitutes a substantial limitation to the principle of national procedural autonomy. Importantly, the organisation of justice in Member States can thus no longer be regarded as a purely internal matter for those states. On the contrary, the Court has made clear that the Member States' competence in relation to their national courts is paired with a legal responsibility to ensure that those courts meet the requirements imposed by EU law, especially that of judicial independence. The recent use and interpretation of the second subparagraph of Article 19(1) TEU therefore marks an impressive expansion of EU law in that it has created an entirely new legal platform upon which the Union can monitor, and ultimately safeguard, the national judiciaries.

6.4 Impact on the Union's Justice System

The analysis above has showed that the Court of Justice's use of the second subparagraph of Article 19(1) TEU has in practice extended the Court's jurisdiction over the organisation of the national judiciaries, at least as regards their independence. As discussed, this amounts to a remarkable legal and constitutional development in itself. However, it also has broader implications, which naturally leads us to the second primary research question of the thesis: How does the recent development impact the relationship between the Court of Justice and the courts of the Member States?

In this respect, it can firstly be noted that an immediate effect of the Court of Justice's interpretation of Article 19(1) TEU is that it has provided the Commission with a new legal platform to use in infringement proceedings against Member States who attempt to undermine the independence of their courts. The immense material scope of the provision is especially important in this regard, as the Commission can essentially use it in relation to any and all national courts whose independence is under threat. Thus, the deployment of Article 19(1) TEU has awarded virtually all the national courts across the Union with a robust legal protection against measures targeting their judicial independence. This protection is now unmistakably upheld at an EU level and is ultimately safeguarded by the Union's own institutions.

Another similar effect of the expansive interpretation of Article 19(1) TEU is that it will likely lead to more requests for preliminary rulings relating to concerns over judicial independence among national courts. In a sense, the national courts have thus been given more possibilities to safeguard their own independence, since they can now rely on the provision to request binding rulings from the Court of Justice over such issues. However, it is important to bear in mind that preliminary rulings can only be requested in cases where a guiding interpretation from the Court is 'necessary' to resolve the national dispute at issue, in accordance with Article 267 TFEU. Thus, the national courts will not be able to use the mechanism in relation to Article 19(1) TEU unless there is a substantive connection between the concrete case before them and the provision.[236] The impact of the Court's broad interpretation of the Article 19(1) is therefore somewhat more limited in

[236] Notably, this aspect has recently been emphasised by the Court of Justice, see Joined Cases C-558/18 and C-563/18 *Miasto Łowic* [2020] EU:C:2020:234, paras. 44-53.

regard to the preliminary ruling procedure, as it does not alter the fundamental requirements of that procedure. Nevertheless, as soon as a connection exists between a national case and Article 19(1) TEU, the procedure can be used by any national court as a way to indirectly protect its own independence by requesting a ruling from the Court.

In light of the above, the national courts can arguably be regarded as the 'winners' of the recent development, since they have received robust legal protection in relation to their independence. However, from a broader perspective the new interpretation of Article 19(1) TEU can also be seen as a staunch defence of the EU's entire justice system. As illustrated, this system revolves around the cooperative relationship between the Court of Justice itself and the national courts; the latter functioning as 'European courts' in that they are essentially tasked with ensuring the effectiveness of EU law. The criterion of independence is particularly important from this perspective, since it is a precondition for the functioning of the preliminary ruling procedure – which is in turn the keystone of the Union's judicial architecture. Any threat towards the quality of the national courts, and in particular their judicial independence, is therefore also a threat to the effectiveness of EU law as such and the entire operation of the Union legal order. The expansive interpretation of Article 19(1) TEU has thereby not only provided protection for the national courts but has also reinforced the fundamental structures of the EU's judicial system.

All considered, it can be concluded that the recent development regarding Article 19(1) TEU has fundamentally strengthened the cooperative relationship between the Court of Justice and the national courts, and notably reinforced their different roles. In particular, the case law has in practice solidified the national courts' role as 'European courts' by establishing that the organisation of justice is not an internal matter for the Member States. Rather, the Court of Justice clearly views it as a European matter, which underlines the vital function that those courts have within the Union. Furthermore, the Court has thereby also bolstered its own position as the central court in the EU's judicial system. That is, if the quality of national courts were to be compromised, and those courts could not use of the preliminary ruling procedure, then the Court's role as central interpreter would also be severely weakened. The use of Article 19(1) TEU as legal bedrock for monitoring and safeguarding the national courts has thus also allowed the Court to reaffirm its leading and influential role within the Union.

6.5 Concluding Remarks

The aim of the present thesis was to explore the Court of Justice's recent use of the second subparagraph of Article 19(1) TEU as a rule of law provision, in order to assess its impact on the scope of EU law and on the relationship between the Court and the national courts. Based on the examination, it can be concluded that the Court's creative and ground-breaking interpretation of Article 19(1) TEU amounts to a remarkable constitutional development of EU law, with implication throughout the Union. The Court has essentially reconfigured the scope of EU law in relation to the national justice systems, thereby strengthening its own position vis-à-vis the national courts while also underlining the importance of those courts within the Union. An overarching effect of the development is thereby that it will allow the Court to take on an even stronger role in protecting the rule of law in the EU, at least in as much as it concerns the judiciaries.

The innovative interpretation of the second subparagraph of Article 19(1) TEU therefore paves the way for a more effective judicial enforcement of the rule of law in EU Member State. Now, the provision provides legal bedrock for future action, and the Court of Justice's recent case law thus forms a crucial part of the Union's overall response to the rule of law crisis. However, it should be noted that the expansive interpretation of the provision can also be criticised. For example, the Court's flexible use of Article 47 of the Charter raises questions as to whether the fundamental limits of the Charter were properly considered in the recent case law. More generally, the development can also be questioned based on the principle of conferral, since the Treaties have not explicitly granted the Union any general competences with regard to the organisation of the national judiciaries.

Nonetheless, the timing of this line of case law, which will enable the Court of Justice to further scrutinise a number of the controversial judicial reforms currently taking place across the Union, is impactful. In essence, it shows that the Court will not remain passive in relation to threats concerning the Union's foundational values, and in particular the rule of law. By deploying the second subparagraph of Article 19(1) TEU, the Court has managed to breathe new life into the value of the rule of law, thus beginning to tackle one of the greatest contemporary challenges facing the Union. Whether the Court will stand by its expansive interpretation of the provision remains to be seen in future case law. For the time being, however, the second subparagraph of Article 19(1) TEU constitutes one of the sharpest tools for the EU to use in its efforts to uphold the rule of law.

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